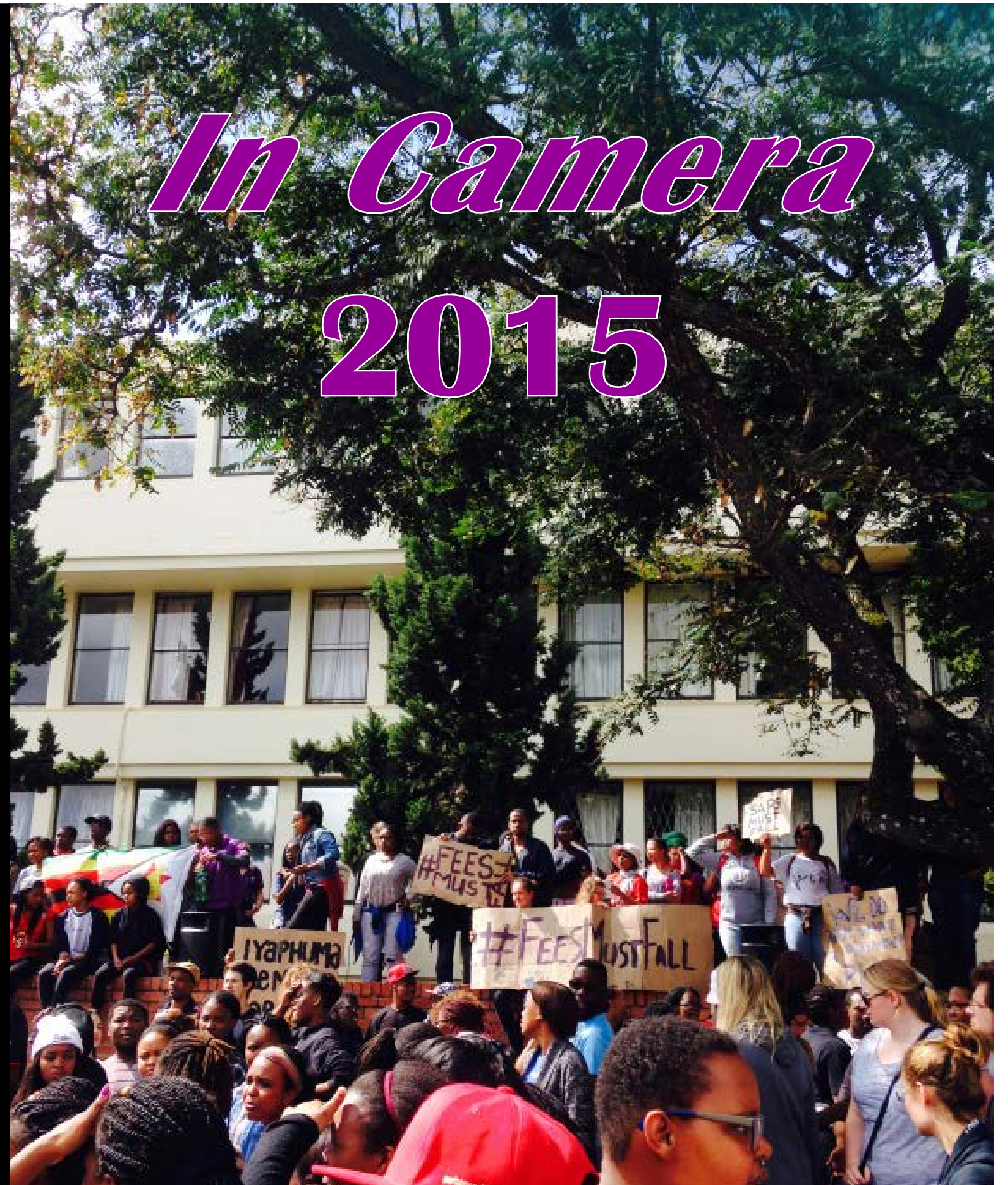
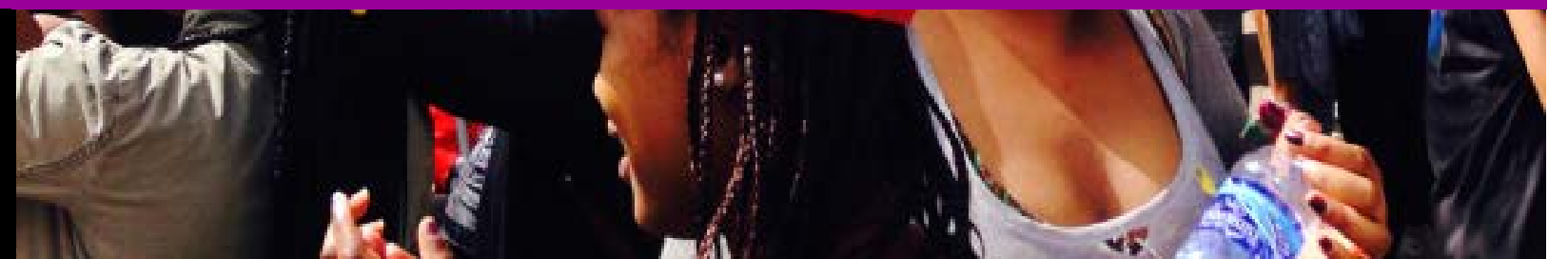


In Camera 2015



LAW SOCIETY 2015

THE YEAR OF THE STUDENT



CONTENTS

Editorial and Reports

- ⌘ *A note from the editors*
- ⌘ *Faculty of Law report 2014-2015*
- ⌘ *Law Society report*
- ⌘ *Black Lawyers Association report*

Articles

- ⌘ *Ten minutes with Advocate Trengove – The editors*
- ⌘ *An evaluation of the efficacy of statutory debt relief mechanisms in South Africa – Ryan McKerrow*
- ⌘ *Religious Ministers – Working for God or working for the Church? A Reflection on Universal Church of the Kingdom of God v Myeni and Others [2015] ZALAC 31– Helena van Coller*
- ⌘ *The reality of virtual money: The risks associated with Bitcoin – Chelsey Smith*
- ⌘ *Shedding light on the state’s nuclear build programme – Tanaka Chibanda*
- ⌘ *A personal perspective on using “tax stories” as a pedagogical tool to bridge gaps in teaching Tax – Richard Poole*
- ⌘ *Too much fuss over sperm and eggs: The genetic-link requirement and surrogacy contracts, and an analysis of the decision in AB Surrogacy Advisory Group v Minister of Social Development – Diana Machingaidze*
- ⌘ *An analysis of the business rescue proceedings in the Companies Act of 2008 – Benjamin Rule*
- ⌘ *Magna Carta: 800 years ago, and today - Graham Glover*
- ⌘ *Are the attack on foreign nationals in South Africa and the violent land grabs in Zimbabwe part of the same culture? – Leonard Mukosi*
- ⌘ *The removal of individual access to the Southern African Development Community (SADC) Tribunal and implications for access to justice for SADC Citizens – Grace Moyo*
- ⌘ *Adding insult to injury: Excessive costs of small credit to become exorbitant – Legislated economic abuse of low-income consumers – Jonathan Campbell*
- ⌘ *The paradox of colonialism: From the conquest of colonial encroachment to the dawn and rise of constitutional democracy – Myra Mufuka*
- ⌘ *Little abused souls: The reality of sexual exploitation of children – Sahar Davachi Omoumi*

A Note from the Editors

Tammy Kibur and Aimee Thorne

We would like to thank all the **contributors** who submitted articles for this year's *In Camera* – we hope this is only the beginning of having your names appearing in publications. We would also like to thank our sponsors, **Norton Rose Fulbright**, whose generosity has made this year's publication possible. The photographs of contributors would also not be as impressive, if not for the skills of **Advocate Les Roberts** and **Jason Houston-McMillan**. Lastly, but certainly not least, we would like to thank **Professor Glover** for his extensive time and incredible editorial skills. Not only have you offered spelling, grammatical and editorial advice, but you have gone beyond this and been willing to become part of our team whenever we needed you. We cannot thank you enough for all of your support and brilliance.

The Law Faculty was sad to say goodbye to some long-standing members of staff, all of whom will be greatly missed. Thank you for all you have done for the Law Faculty, and all the best in the future.

To Ms Haller-Barker:

It was such a privilege to be taught by you – "but why", you may ask? Thank you for always being willing to answer our last minute questions – even if it was only with more questions. More

importantly, thank you for your high standards – you encouraged us to take up the challenge and prove ourselves.

To Ms Niesing:

The guidance you provided to the Law Society has been priceless, and we cannot thank you enough for assisting us in making Market Day a success. Your patience and sweet-natured approach to teaching made all the difference – especially during those challenging years of Legal Interpretation. We wish you well in your new venture, and we're looking forward to hearing of your success.

To Lumka:

Thank you for always greeting us with a smile and making us laugh, especially since we were usually just adding to your workload. We wish you well at the Politics department – they are very lucky to have you.

Finally, to the reader, we truly hope you enjoy reading this year's edition!

Faculty Report 2014 – 2015

Dr Rosaan Krüger (Dean of the Law Faculty), with input from staff and students

The Faculty of Law can look back on and eventful and successful year which brought with it challenges and opportunities. In the broader higher education context in South Africa, the issue of transformation dominated the agenda, and this was no different at Rhodes. Considerations of curriculum, institutional culture, staff representivity and the needs of the changed student population were, and remain, central to the discussion of change in accordance with the constitutional mandate to which Rhodes University and the Faculty of Law subscribe.

In the Faculty, our transformation engagement took the form of an evaluation of curriculum transformation over some years, in accordance with a request from the Vice-Chancellor to consider how our curriculum is fit for purpose and addresses the learning needs of our students. The evaluation provided an opportunity for reflection and the involvement of students in the discussion, and will ultimately pave the way for development and enhancement of our offerings. Transformation is neither linear nor ever completed, and this must inform our commitment to and discussions about change for the better. The student activism and awareness of 2015 around matters of transformation highlighted the need for engagement, discussion and open communication between the institution and its students. The Faculty and Rhodes University remains committed in the interests of our students and our broader society.

Against this background of engagement regarding change and ongoing discussion within the Faculty about transformation, I provide the following report about the events and achievements of 2014 – 2015:

Students, student news and activities

Graduation and awards

On 10 April 2015, 72 students graduated with LLB-degrees from the Faculty. One LLM-candidate, **Phoebe Oyugi** (supervisor Prof Laurence Juma) and one PhD-candidate, **Hetta van Niekerk** (supervisor Research Associate Dr Karen Muller) also graduated at this ceremony. **Dr van Niekerk's** thesis, for which she was awarded the degree, is entitled "Determining the competency of children with developmental delays to testify in criminal trials".

The Faculty celebrated graduation with our graduands, their partners and their parents at a late afternoon function held at the Faculty. At this celebration, 35 final year students (48% of our 72 LLB graduates) were awarded Dean's list certificates in recognition of academic achievement (attaining an average of at least 65% for all their final year courses). A number of individual prizes were also awarded at this function:

- **Brian Peckham Memorial Prize:** Best student in Environmental Law: **Caitlin Askew**
- **Lexis Nexis Book Prize:** Internal book prize for Moot winner(s) in the Final Year: **Armand Swart**
- **Fasken Martineau Prize:** Best LLB student in Competition Law: **Tasmin Marlin**
- **Judge Phillip Schock Prize:** Best final-year LLB student: **Armand Swart**
- **Juta Law Prize:** Best final-year LLB student, based on results over penultimate and final-year LLB: **Armand Swart**

- **Mtshale and Sukha Prize:** Best student in Legal Ethics and Professional Responsibility: **Joanne Kahn**
- **Spoor & Fisher Prize:** Best student in Intellectual Property (Patents & Copyright): **Meghan Eurelle**
- **Phatshoane Henney Incorporated medals:** Awarded to students who obtain their LLB degrees with distinction: **Armand Swart, Ngonidzashe Mugandiwa, Robyn Farmer; Huajun Sun; Tamzyn Cooper; Nadia Froneman and Martin Hare**
- **Tommy Date Chong Award:** Awarded to student who makes the greatest contribution to the Law Clinic in their penultimate and final years of study at the University: **Martin Hare**
- **Rob and Trish Midgley Prize:** Awarded to the student who has contributed substantially towards a holistic educational experience for law students at Rhodes University: **Meghan Eurelle**

At the graduation ceremony, **Prof Laurence Juma** was honoured for his contribution to research by the university as one the joint recipients of the **Vice-Chancellor's Senior Distinguished Research Award**. He shares the award for this year with Prof Charlie Shackleton of the Department of Environmental Science.

LLB intake 2015

83 students accepted offers into LLB this year, only nine of whom were registered for the four or three year LLB-degree, thus indicating that about 89% of our law students continue to choose the five (and occasionally six) year stream, entering the LLB only after completing an undergraduate degree. The lecture rooms at Lincoln House (the Moot and Graham Rooms) will soon reach full capacity with the small but steady growth in LLB numbers, and

the Faculty is looking for means to fund the refurbishment or expansion of its existing lecturing facilities in the near future.

LLM students and student research

2015 saw also an increase in the number of LLM students undertaking research by thesis in the Faculty (seven), as well as a significant increase in the number of LLB students taking the research paper elective (nine). It is hoped that these developments point to the entrenchment of a research culture in the Faculty.

Student news and activities

The long-standing student societies, namely Law Society and Legal Activism, contributed significantly to the success of students' holistic experience in the Faculty, as evidenced from the short reports below. This year also saw the establishment of a third student society for law students, under the auspices of the Students' Representative Council, namely the Black Lawyers Association Student Chapter: Rhodes University. Through its events, this society has raised pertinent questions about transformation, and emphasised the ongoing need for engagement about transformation in the University and Faculty.

Legal Activism

Under the leadership of its chair, Nangisai Mvududu, the society participated in a march against xenophobia, organised workshops for its members on rape, domestic violence and HIV/Aids training, which they then shared in the greater community. The society also organised a successful Constitution Fun Day for children from the Home of Joy.

The society hopes to forge new partnerships with community organisations, and will schedule events well in advance to ensure greater participation from its members.

Law Society

The Rhodes University Law Society, under the leadership of Melissa Scorer, has had a very busy 2015. It successfully organised the annual Rhodes University Law Society Market Day, in which over 20 top law firms and organisations attended to market their firms/organisations with students. The society also hosted various workshops regarding CV-writing, interview and mooting skills. This year the society aimed to involve Legal Theory and LLB-students in its events, and this was achieved through social events that were hosted during the course of the year. A highlight to conclude its activities for the year was its 'Viva Las Vegas' theme for Law Ball. The guest of honour – the Honourable Justice Khampepe – gave an inspiring speech about transformative constitutionalism, which left all with much food for thought before they hit the dance floor.

The members of the committee represented students' interests, in accordance with their mandate, at various Faculty and Departmental meetings. Its leadership engaged actively with the Dean and the Black Lawyers Association regarding student involvement in Faculty governance and management in the future, as outlined below.

Black Lawyers Association Student Chapter: Rhodes University

The BLA Student Chapter was registered as a student society with the SRC towards the end of last year, and commenced its activities in 2015 under the leadership of Thando Ndabeni. The society aims to highlight the need for transformation of the legal profession, a cause supported by Rhodes law students who signed up in numbers for this society. The successful launch of the society was attended a number of prominent legal professionals, including the provincial leadership of the BLA.

In the second term, the BLA, in conjunction with the Silent Protect and the SRC, hosted a dialogue titled "Masculinities and violence" in response to the high levels of domestic abuse in South Africa. Later in the year, delegates of the society attended the National General Meeting of BLASC in Johannesburg, where they rubbed shoulders with the national leadership of the BLA and other esteemed legal professionals. The third term's dialogue addressed the question of whether the law protects protest. Recent and current events on campus informed the choice of the topic. This topic was in response to the increasing graffiti on campus, the occupation of Rhodes Council Chambers, Marikana, and other contemporary issues facing South African society and Rhodes University in particular. Mr Tladi Marumo and Magistrate Jebese of the Regional Court in Grahamstown participated in the dialogue.

The community engagement portfolio was very active and focused on tutoring and mentoring students from the local Grahamstown community. The business for the year was concluded with a glitzy AGM at Saint's Bistro.

2016 and Beyond – Students in Governance Structures of the Faculty

For the past fifteen or so years, the Law Society also fulfilled the role of the Law Students' Council. The latter is the structure that represents students on Faculty Board and in administrative meetings, thus feeding into the decision-making processes in the Faculty. With the establishment of the BLA, it has become necessary to revisit the dual role of the Law Society so as to ensure that all students, irrespective of society membership, are represented in the governance and management structures of the Faculty. To this end, the Dean has engaged with the leadership of societies to determine a way forward. It has been agreed that an interim arrangement – negotiated by the students – will be in place in 2016, while the details of

future student involvement in Faculty structures is finalised.

Alumni achievements

Ninety prospective legal practitioners sat the admissions exams for entry into the legal profession in Namibia in 2015, and only 15 candidates passed the exam at the first attempt. Rhodes Law Faculty alumni Karin Malherbe (née Hoole), AJ Malherbe and Sean McCulloch did their *alma mater* proud by passing this exam with flying colours, and securing places among the top six performers in the country. They were admitted as legal practitioners on 15 June 2015.

Similar figures for South African candidate attorneys are not available, but feedback from our alumni is welcome.

Moot Court and Mock Trial Programme and Competitions

Internal:

Final Year Moot Competition

The internal final-year moot competition occupied both staff and final-year LLB students alike for much of the first term. The moot facts involved a complex issue regarding the change of a wetland into a farming activity, set in the context of environmental and administrative action legislation. The format of the competition was changed, and four students competed in the final – namely Melissa Scorer, Tyron Willey, Sazi Ntuli and Michelle du Toit. Sazi Ntuli was declared the winner, with Michelle du Toit in second place. Sazi Ntuli was awarded the Provident Professional Society Shield and will receive a book prize from LexisNexis. The final was heard by a bench comprised of Judge Glenn Goosen (of the Eastern Cape High Court), Adv Ntsiki Sandi (of St George's Chambers) and Adv Craig Renaud (of the Law Faculty).

In October 2015, Sazi and Michelle will represent Rhodes University at the 24th All

Africa Moot Competition in Lusaka, Zambia, and will be accompanied by Prof Juma.

Penultimate-Year Moot

This year's penultimate-moot topic was on the law of succession – with a twist. The applicant's representatives had to argue that a child posthumously conceived by IVF had a right to inherit from his father's estate, despite the fact that his parents were not married, and there was no formal consent on the part of the deceased for the extraction of the deceased's sperm. The penultimate-year students had to grapple with the conflicting rights of the posthumously-conceived child, as well as the rights of the deceased's other children from his previous marriage, when formulating their arguments for either side.

The moot final – in which the finalists were Stephanie Stretch, Dumisani Mupfurutsa, Paul Burgess and Kristen Breero – was heard by Judge John Smith (of the Eastern Cape High Court, Mr Kamohelo Modise (of Borman and Botha Attorneys) and Ms Sarah Driver (of the Law Faculty). Dumisani Mupfurutsa was announced the winner, and Stephanie Stretch was the runner-up.

External:

ELSA Moot

Against much stiffer competition than last year, the team won prizes for best written submissions for the respondent, best overall written submissions, best orator in the grand final (Ben Rule) and runner-up team in the oral pleadings in the African Round of this competition.

The team represented Rhodes in the International Oral Round in June 2015 in Geneva, Switzerland, was placed 14th overall against some very tough competition.

LexisNexis Mock Trial Competition

In September 2015, two teams from the Faculty participated in the annual LexisNexis Mock Trial Competition, which was hosted by

NMMU in Port Elizabeth. The teams were Diana Machingaidze and Ben Rule, and Jason Manyenyeni and Charlotte Hammick. Both teams fared very well, with Jason and Charlotte being placed first overall in the preliminary rounds, and the two Rhodes teams ended up arguing against each other in semi-finals. Diana and Ben won the semi-final by a single point, and proceeded to contest the final against a team from the University of Venda. Diana and Ben won the final, and thus the competition, returning the trophy to Rhodes Law Faculty after a long absence (Rhodes last won the competition in 2007). The final took place before a bench of five, presided over by a retired High Court judge.

The Rhodes team was coached by Ms Jaylynne Hillier, an attorney at the Rhodes Law Clinic, who was ably assisted by Ms Siphesihle Mguga, a candidate attorney at the Clinic who accompanied the students to the competition.

The Child Law Moot Court Competition

This annual competition hosted by the University of Pretoria took place in September. Rhodes was represented by Jason Manyenyeni and Nina Reinach, who were coached and accompanied by Ms Brahmi Padayachi. Time-keeping issues caused the Rhodes team to have limited opportunity to show their worth, but team members and coach were in agreement that the experience was invaluable.

Kovsie First Year Moot Competition

The competition is in its eleventh year, and Rhodes once again participated successfully. Two Legal Theory 1 teams – consisting of Mfundolunto Somandi and Sisipho Sikwezi, Ryan Birker and Blake Skirving, and a senior student, Omphile Moerane – travelled to Bloemfontein in early October, accompanied by Ms Liezel Niesing. Omphile's heads of argument were awarded a mark of 81%, and she performed well in presenting her oral argument. The junior teams fared well amongst stiff competition, and Ryan and

Blake made it into the final round of the competition.

The educational value of this competition, and the many other competitions that students may participate in, contribute to an overall rounded education, and the Faculty will continue its involvement in these competitions, for the benefit of its students.

Student exchange

Tessa Mitchell, a penultimate-year LLB student, is currently on exchange at the University of Utrecht in the Netherlands. The Faculty hosted Joseph Ashley from Keele University in the UK during the first semester, and is currently hosting Roos Bos from Utrecht University, as well as Denzel Malikwa from Midlands State University, Zimbabwe.

Staff, staff news and activities

Staff news

Ms Saronda Fillis, who held the position as the Faculty Administrator for five years, left the Faculty in December 2014 to take up a position at the University of Pretoria. Her departure left a gap in Faculty Administrative office which was ably filled on a temporary basis by Mr Chad Gill during the first few months of this year. In April, Mr Kamo Bodibe joined the Faculty in this position, but a better offer closer to his home lured him away within three short months. Mr Gill is in an acting position again until a permanent appointment can be made.

The Administrative Office had its fair share of change with the departure of our secretary, Ms Lumka Mqingwana, in August 2015. Ms Mqingwana has been appointed as the Office Administrator in the Department of Politics. The secretarial position is currently filled on a temporary basis by Ms Fezeka Mwellie, who seamlessly stepped into the position.

At the end of 2014, Prof Jobst Bodenstein, director of the Law Clinic, was granted academic leave by the university for the 2015

year. Prof Jonathan Campbell was seconded from the Faculty to the Clinic to act as director in the place of Prof Bodenstein.

Mrs Liezel Niesing resigned from the Faculty, with effect June 2015, to take up her passion for music. The long relationship of Mrs Anj Haller-Barker with the Faculty also came to an end in August 2015, with her family relocating to Pretoria. Mr Tladi Marumo, who joined the Faculty on the accelerated development programme, also left the university's employ in August 2015, in order to complete his LLM degree before taking on the world outside.

Two staff members joined the Faculty in the second half of 2015. Mr Phumelele Jabavu is a journalist-turned-lawyer who graduated with his LLB from Wits University. He will be teaching the Law of Delict, amongst other things. Mr Siraaj Khan, a Durbanite and UKZN LLB and LLM graduate, joins the Faculty from private practice as an attorney. He will be teaching Criminal Law, amongst other things.

Change in the composition of the staff of any organisation is inevitable and healthy. The Faculty is grateful for the commitment and service of its former staff members, and we wish them well in their journeys onward. We welcome the newcomers, and we trust that the Faculty and Rhodes University will soon be their academic home.

Part-time lecturers and visiting lecturers

The secondment of Prof Campbell to the Clinic, and the departure of staff members, required the employment of part-time lecturers to cover the teaching of all our courses. Ms Tayla Waterworth, a recent graduate and LLM student, provided valuable service in her teaching of Legal Theory 1 and Legal Theory 2 courses, while Adv Nicola Redpath-Molony's practical experience in the criminal courts placed her ideally to teach Criminal Procedure B and Criminal Law B. Mr Lutho Dzedze, an attorney from the Clinic, ably assisted in the teaching of a paper in Commercial Law 2. Mrs Niesing and Mrs

Haller-Barker continued to support the Faculty in a part-time capacity, to ensure that students were not left in the lurch. Our stalwart part-timers, Ms Anita Wagenaar (Legal Accounting), Mr Richard Poole (Tax Law), and Dr Andrew Pinchuck (Numeracy) once again contributed to the rounded educational experience of our LLB students.

Professor Donald Nicolson of the University of Strathclyde in Scotland, who was awarded an OBE for his contribution to legal education, was appointed a visiting professor in the Faculty this year.

Earlier this year, Prof Nicolson spent a week at the Rhodes Law Faculty and Law Clinic on a prestigious Senior Mellon Scholarship. He has published in various areas, predominantly on legal ethics and clinical legal education, evidence, law and gender, feminist legal theory and adjudication. His current research interests are in the areas of evidence and lawyers' ethics, with particular reference to moral development. His rallying call to the Law Faculty was to interrogate the meaning of access to justice in the new South Africa. Amidst intense discussions on possible collaboration and learning opportunities, Prof Nicolson co-taught consultation skills with Prof Jonathan Campbell, presented a staff seminar on *Making Lawyers Moral Through Education*, and conducted a workshop/discussion group with clinicians at the Rhodes Law Clinic.

Judge Nambitha Dambuza, judge of the SCA, has been appointed the first female visiting professor in the Faculty, while Chris McConnachie, an alumnus and DPhil graduate of Oxford University, as well as a pupil advocate at the Johannesburg Bar, was appointed a research associate of the Faculty. Both appointments are for three-year terms.

Professor Chuks Okpaluba, visiting professor, College of Law, University of South Africa and adjunct professor, Nelson Mandela School of Law, University of Fort Hare, visited the Faculty in March 2015 as part of an on-going

research collaboration between him and Professor Laurence Juma. In their joint project, the duo will focus on the important constitutional principle of judicial independence and impartiality with a view to a publication in 2016. While at Rhodes, Prof Okpaluba delivered lectures to students and presented a seminar to staff.

As part of International Week, Professor Makau Matua from Buffalo Law School, New York, USA, and Professor Tinyanjana Malua from Pennsylvania State University, USA, visited Rhodes University to participate in discussion on the International Criminal Court and Africa. Members of staff of the Law Faculty were treated to a fascinating discussion on the topic with the visitors, prior to the debate hosted by the International Office.

Our longstanding association with Mr Max Boqwana, Adv Wim Trengove SC and Judge Clive Plasket continues, while the term of Prof Digby Koyana as visiting professor will come to an end at the end of 2015.

Community Engagement

Faculty initiatives

This year has seen the Law Faculty forging new partnerships in the community and building on the initiative it developed in 2014. In the first semester of this year, members of the academic staff, supported by interpreters and professional staff from the Clinic, presented workshops at the Assumption Development Centre (ADC) in Joza on topics identified by members of the community as being relevant. In second semester, we formed a new partnership with Radio Grahamstown as a result of our engagement during the Trading Live for Mandela week.

Workshops that have been given thus far include how to bring a claim in the Small Claims Court, how to go about bringing a class action, divorce and debt collection proceedings, and information about the rights

of complainants in rape cases, among other topics. Our Radio Grahamstown shows have thus far included discussions on evictions with Dr Gustav Muller, customary marriages with Ms Helen Kruuse, and the legal issues relating to churches with Dr Helena van Coller.

The Faculty looks forward to integrating these two initiatives in the next year.

Clinic

Staffing

In December 2014, the Law Clinic celebrated the contributions of Mr Gordon Barker (retirement as Chair of the Management Committee) and Ms Thandeka Heleni (25 years) to the Clinic. Prof Laurence Juma is the new Chair of the Management Committee.

Ms Thembakazi Mvemve joined the staff as a candidate attorney in place of Mr James Ekron, who finished his articles on 31 January 2015. Three new candidate attorneys were appointed from July/August: Ms Ziphozihle Zuba LLB (WSU), Mr Lubabalo Mabhenxa LLB (UFH), and Ms Sipesihle Mguga BA (UCT) LLB (Unisa). They replaced Mr Thoko Sipungu, Ms Tlamelo Mothudi and Mr Lutho Dzedze, all Rhodes graduates. Mr Dzedze is now employed as an attorney.

Central Cleaning Services took over the cleaning of the extensive Law Clinic premises from March 2015, from which date Vuyo Ntamo became a permanent member of RU staff at CCS, working full-time for the Clinic. Ms Zikhona Nyikilana was appointed to the position of administrative intern from 1 July.

Research and projects

An exciting new development in the Clinic is its initiative to promote a research culture in the Clinic. On the first Friday afternoon of each month, staff take turns to present a research seminar to colleagues. This has paid off as several staff members of the Clinic have participated in conferences, as outlined below.

The Law Clinic is engaged in a number of projects, chief amongst which is the advice office work, involving training and back-up legal services to paralegal advice offices from throughout the Eastern Cape Province.

The Clinic has also taken steps to bring itself to the community and in partnership with the Assumption Development Centre (ADC). Every Thursday morning, an attorney and a candidate attorney are available to consult with clients at the ADC in Joza from 9am to 12pm, for which the ADC provides administrative support.

Staff activities – teaching and learning, research

Academic staff members are employed to contribute to the three pillars of the university, namely teaching and learning, research and community engagement. In what follows, I outline the different contributions, and highlight some significant aspects in more detail.

The Curriculum: Ethics in the Foreground

In 2015, Rhodes Law Faculty became only the second law faculty in South Africa to introduce a compulsory ethics and professional responsibility course into its curriculum to fulfil its commitment to the ideals of justice, fairness, integrity and dignity. Support for the course has been overwhelming from alumni and friends of the Faculty. Upon hearing that the course had been made compulsory, Mbuso Mtshali and Rajesh Sukha (who currently sponsor the Mtshali and Sukha Legal Ethics Prize for the top ethics student) raised the prize money from R1 500 to R3 000. Mbuso Mtshali, an alumnus of the Faculty and Sanlam Investments Head: Legal, Compliance and Company Secretariat, initiated a discussion on the importance of ethics as the keynote speaker at the Faculty's opening function in 2013, and is an ardent supporter of the Faculty's empowerment initiatives together with other alumni. Rajesh Sukha, Sanlam

Investments: Corporate Governance Specialist, graduated from the University of the Western Cape with a law degree. He is firmly of the belief that with ethics playing such a pivotal role in corporate governance, the sooner students are exposed to ethics, the better it will be entrenched in the legal profession. The Faculty shares that belief.

Publications by staff and postgraduate students over the past year that are in national and international publications:

It is not every day that a member of staff in our Faculty publishes a book, and it is further not often that our publications are referred to by courts, yet both happened in 2015 for **Professor Graham Glover**. The third week of January 2015 saw the release, in print, of the fourth edition of *Kerr's The Law of Sale and Lease*, authored by Professor Glover. Professor Glover had been requested to continue the legacy of Professor Kerr's books by Prof Kerr himself, before he became ill and passed away in 2010. This new edition is the first of Prof Kerr's books (which will retain his name in the title) that has been revised by a new author. *Sale and Lease* is one of the leading monographs on these two fundamentally important areas of law in South Africa. The book has been extensively modernised and revised to take into account more than a decade of new material and legal developments since the last edition was published in 2004. In particular, the book analyses the key pieces of legislation that have added a layer of complexity to what were traditionally subjects dominated by common-law analysis: the Consumer Protection Act, the National Credit Act and the amended Rental Housing Act. Within two weeks of its release, it was cited in a high court judgment.

Books/Chapters/Monographs

Glover, G.B. (2014) *Kerr's Law of Sale and Lease*. 4th Ed. Durban: LexisNexis (Pty) Ltd. ISBN: 9780409049374.

Glover, G.B. (2014) "Improperly obtained consensus in the law of contract and the value of institutional doctrine" in Visser, C. and Pretorius, J.T. (eds.). *Essays in Honour of Frans Malan*. Durban: LexisNexis (Pty) Ltd. 133-145. ISBN: 9780409120882.

Van Coller, E.H. (2015) "The Role and Duty of Religious Organisations in Civil Society" in Coertzen, P. et al *Law and Religion in Africa. The Quest for the Common Good in Pluralistic Societies*. Stellenbosch: SUN Media 331-346. ISBN: 9781919985633.

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Juma, L.O. (2014) "Unclogging the wheels: How the shift from politics to law affects Africa's relations with the international system" *Transnational Law & Contemporary Problems* 23 (2) 305-453.

Juma, L.O. and Okpaluba, C. (2014) "Apprehension of Bias and the Spectacle of the Fair-Minded Observer: A Survey of Recent Commonwealth and South African Decisions on Prejudgement" *Speculum Juris* 28 (2) 19-40.

Khayundi, F.M.B. (2014) "The South African Human Rights Commission's Role in the Promotion, Protection and Monitoring the Right to Education in South Africa" *Speculum Juris* 28 (2) 227-239.

Krüger, R. (2014) "The (In)Significance of the Common Law? Constitutional Interpretation and the *Mansingh* judgments" *South African Law Journal* 233-244.

Krüger, R. (2015) "The Ebb and Flow of the Separation of Powers in South African Constitutional Law – the Glenister Litigation Campaign" *Verfassung und Recht in Übersee* 48 (1) 49-64.

Kruuse, H and Sloth-Nielsen, J. (2014) "Sailing between Scylla and Charybdis: Mayelane v Ngwenyama" *Potchefstroom Electronic Journal* 1710-1738.

Kruuse, H and Mwambene, L. (2015) "Unfulfilled promises? The Implementation of the Recognition of Customary Marriages Act in South Africa" *International Journal of Law, Policy and the Family* (forthcoming October 2015).

McConnachie, C. (2015) "Transformative Unfair Discrimination Jurisprudence: The Need for a Baseline Intensity of Review" *South African Journal on Human Rights* (forthcoming).

Muller, G. (2015) "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" *South African Law Journal* 616-638.

Muller, G. (2015) "Proposing a way to develop the substantive content of the right of access to adequate housing: An alternative to the reasonableness review model" *South African Public Law* (forthcoming).

Nwauche, E.S. (2014) "The Swakopmund Protocol and the Communal Ownership and Control of Expressions of Folklore in Africa" *The Journal of World Intellectual Property* 17 (5-6) 191-201.

Nwauche, E.S. (2015) "A Comment on the Exclusive Jurisdiction of Domestic Religious Tribunals in South Africa: De Lange v The Presiding Bishop of Methodist Church of Southern Africa" *Oxford Journal of Law and Religion* 2(1) 1-5.

Nwauche, E.S. (2015) "Civil Questions Involving Customary Law as the Basis of Appellate Jurisdiction" *Acta Universitatis Danubius Juridica* 11(1) 38-53.

Nwauche, E.S. (2015) "The Protection of Indigenous Terms and Expressions by the Merchandise Marks Act in South Africa" *Queen Mary Intellectual Property Law Journal* 5 (2) 214-225.

Nwauche, E.S. and Jobeta, T. (2015) "Double Marriages in Botswana: Possibilities Implications and Comparative Perspectives"

International Journal of Law Policy and the Family 29 (1) 1-11.

Nwauche, E.S. (2015) "The Emerging Right to Communal Intellectual Property" *Marquette Intellectual Property Law Review* 225-243.

Nwauche, E.S. (2015) "Affiliation to a New Customary Law in Post-Apartheid South Africa" *Potchefstroom Electronic Law Journal* 18 (4) (forthcoming).

Nwauche, E.S. (2015) "Child Marriages in Nigeria (Il)legal and (Un)Constitutional" *African Human Rights Law Journal* (forthcoming).

Nwauche, E.S. (2015) "Book Review of TW Bennett: Traditional African Religion in South African Law" *Journal of Law and Religion* (forthcoming).

Oyugi, P. (2014) "Cooperation Disputes Between African States Parties to the Rome Statute and the International Criminal Court: Is the End Anywhere Near?" *Speculum Juris* 28(2) 123-142.

Arendse, J., Stark, K. and **Renaud, C.** (2015) "Any place I hang my hat is home – can we still hang our hat on the Cohen and Kuttler Principles?" *South African Business Review* 1-24.

Research Papers Presented at Academic/Scientific Conferences (Non-peer-reviewed Proceedings):

Bodenstein, J. "Quo vadis the "bleeding heart" law clinician – welcome to the real world" *Law Teachers Conference*, Varsity College, Durban. July 2015.

Campbell, J. "Consumer credit law at the interface between justice education and consumer rights" *International Consumer Conference*, University of Pretoria, Pretoria. September 2014.

Campbell, J. "Service learning at the Rhodes University Law Clinic" *Rhodes University*

Community Engagement Symposium, Grahamstown. May 2015.

Campbell, J. "The incorporation of justice education through clinical legal education in LLB programme design" *Law Teachers Conference*, Varsity College, Durban. July 2015.

Campbell, J. "The purpose and impact of justice education, and its incorporation in legal education programme design" *8th Global Alliance for Justice Education (GAJE) World Conference, Justice Education for a Just Society*, Turkey. July 2015.

Cooper-Bell, T and **Mpofu, N.** "A Law Clinic Approach to Community Engagement: 'Making Justice Work' through Project Involvement" *Rhodes University Community Engagement Symposium*. Grahamstown. May 2015.

Dzedze, S. "The Actio Iniuriarum Claim for Damages based on adultery in light of *RH v DE*" *NMMU Private Law and Social Justice Conference*, Port Elizabeth. August 2015.

Glover G. "Should the Constitutional Court be principled, or just be "cool" to the parties? *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC)" *NMMU Private Law and Social Justice Conference*, Port Elizabeth. August 2015.

Hillier, J and Welgemoed, M. "First do no harm – best practice for clinical supervisors" *Law Teachers Conference*, Varsity College, Durban. July 2015.

Juma, L.O. "In the Interest of Justice': Mediating the justice and peace Roles of the International Criminal Court in Africa" *Transitional Justice Conference*. Catholic University, Nairobi. Kenya. October 2014.

Juma, L.O. "Implication of the Private Security Industry Regulation Amendment Act 2012 on South Africa's Constitution" *Private Security Industry Regulation Reform Seminar*, Mandela Institute, Wits Law School, Johannesburg. March 2015.

Juma, L.O. "Appraising the role of the African Union in the Promotion of International humanitarian law in Africa" *Southern Africa Law Teachers Conference*, Varsity College, Durban. July 2015.

Juma, L.O. "Contemporary Challenges to IHL: Private Military and Security Companies" *The ICRC 15th Annual Regional Seminar on IHL*, Department of International Relations & Cooperation, Conference Centre, Pretoria. August 2015.

Krüger, R. "Combating racism and restoring dignity? A review of work of the Durban Equality Court 2003-2013" *Workshop on Twenty Years of South African Constitutionalism: Constitutional Rights, Judicial Independence and the Transition to Democracy*. New York Law School, New York. United States of America. November 2014.

Krüger, R. "Law regulating behaviour – the case of harassment" *Law Teachers Conference*, Varsity College, Durban. July 2015.

Kruuse, H. "Legal ethics education: Using theory for best practice" *Law Teachers Conference*, Varsity College, Durban. July 2015. (Ms Kruuse was invited as a member of the opening plenary panel on ethics education at the conference.)

Muller, G. "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" *South African Research Chair in Property Law Alumni Week* Stellenbosch University, Stellenbosch. August 2014.

Muller, G. "Developing the substantive content of the right of access to adequate housing: An alternative to the minimum core and the normative vacuum" *Land and housing: Prospects and Challenges*, Pretoria. September 2014.

Muller, G. "The meaning and significance of "home" for people living with insecure tenure" *Workshop on The Precarious Home: Socio-legal Perspectives on the Home in*

Insecure Times, International Institute for the Sociology of Law, Onati, Spain, 25–26 June 2015. (Dr Muller received a Knowledge, Interchange and Collaboration award from the National Research Foundation for this paper.)

Muller, G. "The impact of the National Environmental Management: Biodiversity Act 10 of 2004 on the obligations of a usufructuary" *NMMU Private Law and Social Justice Conference*, Port Elizabeth, August 2015.

Nwauche, E.S. "Neutral Principles and the Criminal Prosecution of Religious Leaders in African States: a Constitutional Inquiry" *Third ACLARS (African Consortium for Law and Religion Studies) Conference "Religious Freedom and Religious Pluralism in Africa*, University of Namibia, Windhoek, Namibia. May 2015.

Nwauche, E.S. "Expanding Constitutional Justice: Direct Access to Anglophone African Constitutional Courts" *Third Stellenbosch Annual Seminar on Constitutionalism in Africa*, Stellenbosch University, Stellenbosch. September 2015.

Nwauche, E.S. "Emerging Standards in the Protection of Traditional Cultural Expressions in Africa" *34th Annual Conference of the International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP)*, Cape Town. September 2015.

Van Coller, E.H. "Freedom of Religion and Religious Education: Challenges and Opportunities" *Fifth International Conference on Religion and Spirituality in Society*, University of California, Berkeley, California, United States of America. April 2015.

Van Coller, E.H. "Homosexuality and the Church: Controversies and Challenges" *Third ACLARS (African Consortium for Law and Religion Studies) Conference "Religious Freedom and Religious Pluralism in Africa*,

University of Namibia, Windhoek, Namibia. May 2015.

Van Coller, E.H. "Homosexuality and the Church: Challenges and Controversies, local and global" *SA Akademie vir Wetenskap en Kuns Jaarlikse Symposium*, University of Pretoria, Pretoria. September/October 2015.

Besides conference participation, staff also engaged in a number of other research and teaching related activities:

Campbell, J Submission to the Department of Trade and Industry on Draft National Credit Regulations regarding the Review of Limitations on Fees and Interest Rates. July 2015.

Campbell, J. "Never been costlier to take loans" article published in the Business Section of the *Mail and Guardian*, 28 August – 3 September 2015.

Davies, G.E. Participant. Writing Skills in Legal Education Workshop. Sponsored by Werksmans Attorneys. Stellenbosch University, Stellenbosch. September 2015.

Haller-Barker, A.H.A. Participant. Planning of a joint module in Forensic Law. *Forensic Science and Law*. University of Cape Town Law School, Cape Town. South Africa. October 2014.

Haller-Barker, A.H.A. Participant. Strategic litigation in Environmental Law. *Environmental Law Association Workshop*. Valverde, Muldersdrift, Johannesburg. South Africa. October 2014.

Juma, L.O. "Wading through troubled waters: Supporting the work of the International Criminal Court through domestic legal institutions in Africa" Distinguished Lecture, Fredrick K Cox International Law Centre, Case Western Reserve University Law School, USA. September, 2015.

Juma, L.O. "Right to development and people of African descent: prospects and challenges" Keynote address, 16th Meeting of the UN

Working Group of Experts on People of African Descent, United Nations, Geneva, Switzerland. March 2015.

Krüger, R. Participated in a panel discussion on legal education at a symposium following the "Twenty Years of South African Constitutionalism Workshop" held at Stellenbosch University, Stellenbosch, South Africa, March 2015.

Muller, G. Presented a guest lecture entitled "Adjudication of socio-economic rights under the Optional Protocol to the ICESCR" at the Centre for Human Rights at the University of Pretoria as part of their *Advanced Short Course on the Justiciability of Socio-Economic Rights in Africa*, May 2015

Nwauche, E.S. Participated in the International Association for Constitutional Law (IACL) Roundtable on Separation of Powers in the Global South, University of Johannesburg, Johannesburg. May 2015.

Van Coller, E.H. "The pastor who took his church to court" article published in the Law Report Supplement to the *Mail and Guardian* 28 August – 3 September 2015.

Other involvement and achievements

Following the July 2015 meeting of the South African Law Deans' Association, the Dean, **Dr Rosaan Krüger**, was elected as one of the two vice-presidents of the Association.

Ms Helen Kruuse established a family-law reading group in the Faculty. The group, consisting of senior students with an interest in family law, meets once a month and has hosted two visitors from Macquarie University, Australia (Prof Denise Meyerson and Prof Therese McDermott) in February 2015 who spent an hour with them discussing their ideas. The publishing house, Juta, kindly donated their latest book on family law, Jackie Heaton's *The Law of Divorce and Dissolution of Life Partnerships in South Africa* (2014), to each of the students.

Ms Helen Kruuse was one of three representatives of the University at the Council for Higher Education's Quality Enhancement Project Workshop held in Port Elizabeth in March 2015. She also participated in a learning and teaching workshop at Wits in May 2015 on *The Australian Teaching Criteria and Standards Framework*. In August 2015, Ms Helen Kruuse was appointed to chair the SALDA task team on ethics education and this task team will be hosting a workshop in October 2015 at UNISA.

Prof Enyinna Nwauche was appointed as a visiting professor of law at Madonna University in Nigeria. He was also appointed a member of the African Union (AU) Working Group to Develop a Model Law to Combat Illicit Trafficking in Cultural Goods in Africa.

Dr Helena van Coller was invited as guest lecturer to the Department of Church History and Church Polity at the Faculty of Theology, University of Pretoria during October 2014. She presented numerous lectures to 5th and 6th year Theology students on issues of homosexuality, church law and church polity.

Faculty events

Faculty opening

Ms Angela Quintal, alumna of the Faculty of Law, and at the time editor of the *Mail and Guardian*, officially opened the Rhodes Law Faculty on 26th February 2015. Ms Quintal captured the students' imagination. She spoke of her time at Rhodes during the troubled times of apartheid, and her decision to give up an LLM at Rhodes to follow a career in journalism at the dawn of democracy. She remembered, in particular, a class mate who was detained without trial during his LLB under apartheid legislation, and who later died in dubious circumstances. Her story exemplifies the all-round graduate that the Law Faculty endeavours to promote: a graduate committed to justice in society and who strive to achieve this despite the personal cost to him- or herself.

After the talk, Ms Quintal presented prizes to the achievers of 2014 and engaged with staff and students.

Public lectures

The second semester of this year saw our visiting professors delivering outstanding public lectures, drawing students, university and staff and members of the community to these events.

On 5 August 2015, Judge Clive Plasket delivered his first public lecture at the Faculty. He presented a riveting account of the way in which the coercive powers of national sporting bodies should be handled at the Rhodes Law Faculty. His paper, entitled 'The Fundamental Principles of Justice and Legal Vacuums: the Regulatory Powers of National Sporting Bodies' addressed various concerns related to the operation of sporting bodies in the public domain. Introduced by the Dean of the Faculty as the "Faculty's trusted advisor, friend, judge, ... gardener and fisherman", Judge Plasket engaged an audience which consisted of students, judges, advocates and attorneys, together with the VC Dr Sizwe Mabizela, DVC Dr Peter Clayton and Director of Research Ms Jaine Roberts.

The high quality of Judge Plasket's lecture was continued with the thought-provoking public lecture by Mr Max Boqwana on 17 August 2015, in which he addressed students, and staff on 'Law, politics and the Al-Bashir judgment', eliciting intense discussion and debate. Adv Wim Trengove SC shortly thereafter drew a crowd with his lecture entitled "The clash of equality and religion rights: *De Lange v Presiding Bishop of the Methodist Church of Southern Africa*" and, with familiar distinction, succinctly outlined the core issues and considerations in this complex matter. Prof Digby Koyana, doyenne of customary law in South Africa, concluding this year's public lectures and his term as a visitor at Rhodes, captured the attention in a lunchtime presentation on Mrs Winnie Madikizela-Mandela's claim to Qunu.

Our visitors add diversity, expertise and practical experience to the offerings in the Faculty, and we look forward to the contribution of old and new visitors to the discussions in 2016.

Conclusion and prospects

This year has been a year of reflection, of listening and of learning. Education, and particularly legal education, requires teacher and learner to learn, to unlearn, to analyse, to question and to build new understandings. From the moot topics to the public lectures, the engagement regarding new student governance structures and the discussions about curriculum, 2015 has exemplified that

which legal education at Rhodes University has been about.

On this foundation of engagement, the Faculty is looking forward to more reflection on what we do, critical analyses thereof, and the conceptualisation of a qualification with relevance to our students within the South Africa, African and global context brought about by the Council on Higher Education's National Review and Reaccreditation of the LLB degree in 2016.

R Krüger

6 October 2015

Law Society Report 2015

Melissa Scorer (President)

2015 has been an incredibly busy and exciting year for the Rhodes University Law Society. This year's committee, consisting of myself, Chelsey Byron, Jason Manyeneni, Aimee Thorne, Nonny Nkambule, Chelsey Smith, Jonty Espen, Tammy Kibur and Tapiwa Nhari made it our mission to take the society to new levels, and we have our membership base of 353 law students to thank for helping us realise our dreams.

To kick off the year, we hosted a very successful *curriculum vitae* and interview skills workshop, in collaboration with the Rhodes University Career Centre. The Moot Room was filled to capacity, and we even had the pleasure of two final year law students giving advice to our law students, speaking from their own personal experiences with various law firms. This workshop proved to be of invaluable advantage for those who applied to firms and received interviews at the Law Faculty Market Day.

The Annual Law Faculty Market Day took place in the first term and we had over 20 law firms and organisations in attendance. We received generous sponsorships from Norton Rose Fulbright, Edward Nathan Sonnenbergs, Adams and Adams, Hogan Lovells and Cliffe Dekker Hofmeyr. This was also the first time that the Law Society has co-sponsored an event. It was exciting to see so many law students visiting all of the firm's and organisation's stands, asking questions and enquiring about their future careers.

We also helped with a number of interesting and thought-provoking public lectures throughout the year, which were hosted by the Law Faculty. Some of these guest speakers

included Judge Clive Plasket, Prof Digby Koyana, Max Boqwana, Adv Wim Trengrove.

In the second term, we hosted a very well-attended social function at the Rhodes Sports Pavillion. It was thoroughly enjoyed by all and allowed law students from all years to mingle and integrate. We also arranged the Law Faculty hoodies and made sure that all law students were given an opportunity to purchase hoodies – especially those students on financial aid. Our moot club successfully held a mooting workshop, and we hope to establish an internal moot competition next year within the society itself. Thanks must go to Adv Renaud, Ms Heideman, Ben Rule and Diana Machingaidze for sharing their knowledge, and giving up their time to speak at this workshop.

The highlight of the year had to be the Annual Law Ball, which we hosted at the beginning of the fourth term. This 'Viva Las Vegas'-themed event was graciously sponsored by Norton Rose Fulbright. We had the pleasure of hosting our Guest of Honour – the Honourable Justice Khampepe for the night. Her speech on transformative constitutionalism was encouraging and inspirational, to say the least. We were all made more aware of our role in society as soon-to-be young lawyers. I can indeed say that all those in attendance were amazed by Justice Khampepe's grace and humility. We all danced the night away in celebration of a very busy, but sensational year.

It has been a pleasure to serve on the Law Society Committee – and so rewarding! I have only my committee to thank, because without them, none of the above would have been possible. To each and every one of you –

Chelsey B, Taps, Tammy, Aimee, Nonny, Jason, Jonty and Chelsey S – thank you! You each brought something special to our team and made 2015 one of the best yet for the society! It has been an absolute pleasure working with you all.

Lastly, I wish to acknowledge the overwhelming support of our classmates and the Faculty staff (particularly to Mrs Niesing) who have been beside us every step of the way on this incredible journey.

To the 2016 committee – I wish you every success and I hope to see you take the society to even greater heights.

To the leavers of 2015 – it has been an honour to have shared this LLB journey with you. I wish you the best of luck, good health and all the happiness in the world. I am positive that I will see you all doing amazing things and putting your LLB degree to good use.

"Twenty years from now, you will be more disappointed by the things that you didn't do than by the things you did do. So throw off the bowlines. Sail away from the safe harbour. Catch the trade winds in your sails. Explore. Dream. Discover." *Mark Twain*

Black Lawyers Association – 2015 Report

Thando Ndabeni (President)

This year saw the launch of the Black Lawyers Association Student Chapter at Rhodes University. The Student Chapter is a subsidiary of the fully-fledged Black Lawyers Association – an organisation for practising attorneys, advocates, prosecutors and other professionals who are employed in or carry out work in the legal industry. Student chapters were launched in universities around the country in 2010. Rhodes University was one of the last universities to jump on this boat, along with Wits University.

The history of the BLA is quite interesting and lengthy: this organisation was formed in 1977 by a group of black attorneys (black, Indian and coloured) who practiced in the inner city of Johannesburg. In terms of the Group Areas Act, black people were not permitted to carry on employment or reside in certain areas. These brave attorneys formed a group which had the purpose of fighting the effects of the Group Areas Act to the extent that it impacted their law practices, such as the effects of curfews, location of offices, and so on. Another important factor which led to the forming of this association were court rules, which were particularly discriminatory against black attorneys.

One of the discriminatory practices which inspired the formulation of this association can be seen in the case of *S v Pitjie*, where a practising attorney was charged for contempt of court. In 1956, Mr Pitjie was a candidate attorney to Nelson Rholihlahla Mandela and the legendary Oliver Tambo in their firm, Mandela Tambo Attorneys. In this case, he

appeared in the Magistrate's Court to defend Mr Stephans Nierkerk. The problem started when Mr Pitjie decided to sit at a table inside the court which was apparently meant for white practitioners only. His principal, Mr Oliver Tambo, had appeared before the same magistrate ten days before, to defend the same client. He had withdrawn from the case when he was told that he would not be heard unless he moved to the non-white table. The magistrate requested the same from Mr Pitjie, who refused and enquired as to why he should sit at the other table. The magistrate said he was not prepared to argue with him, and found him guilty of contempt of court. He was fined five Pounds, alternatively five days in jail. Mr Pitjie appealed this decision, and in his affidavit he said the following:

"I had good reason to believe that the special treatment meted out to me was because I am an African. If the magistrate had told me that that was the reason, it was my intention to tell the magistrate that neither I, nor my client, would feel that he had been defended in his best possible interests if he was to be defended by me, and for that reason I was going to withdraw."

The appeal court held that the magistrate's action was a competent one, as it was apparent from the above-mentioned statement that the appellant knew of the existence of the separate facilities in the court. Furthermore, he had purposely taken the seat provided for whites, with the

intention of defying an order to move to the other table, when one was given. The appeal was dismissed.

It is also interesting to note that there are ties between the Deputy Chief Justice Mr Dikgang Moseneke and the BLA. In 1977, Mr Dikgang Moseneke, then an attorney in Pretoria and a staunch member of the BLA, approached the group for assistance when his application to the side bar was opposed. In the same year, a discussion group was formally launched when one of the founding members was refused admission to the sidebar. The group took the matter up and faced their first big challenge against the system. The matter is reported in the *South African Law Reports*.

Judge Moseneke had studied law while serving ten years in prison at Robben Island, after being charged with sabotage in contravention of section 21 of Act 71 of 1962. He obtained a BA and B Proc degree, and after his release obtained a LLB degree. He served as a candidate attorney until 1978.

The report states that although Moseneke, a South African by birth, was considered not to be a fit and proper person to be admitted as an attorney by the Law Society, his application was complicated by two factors:

1. On the 2nd of July 1963, he was found guilty of sabotage and convicted; and
2. On the 6th of December 1977, he ceased to be a South African citizen by reason of s 56(1) of the Status of Bophuthatswana Act 89 of 1977.

The Law Society had queried whether Moseneke had belonged to a Tswana group, which had been granted independence in 1976, and therefore was no longer a South African citizen when he applied for admission as an attorney.

On making enquiries, the group met members of the executive committee of the Law Society at a meeting held on the 25th of January 1978. After a thorough investigation was done by both sides, it was found that although Moseneke had ceased to be a South African citizen, by reason of the provisions of the Act, he did not forfeit any existing rights, privileges or benefits. He retained, among other things, his right of permanent residence. As he normally resided in the Republic, he qualified for admission as an attorney at his place of residence. He was thus admitted and enrolled as an attorney in 1979.

The Rhodes University chapter

In 2014, a group of Rhodes University students met up and decided to make efforts to launch a Student Chapter. They were Sinokuhle Klaas, Prudence Dyofile, Pedro Fernandes, Alex Kawondera, Ayanda Mbonani, Sethu Khumalo, Siseko Kumalo, Naso Zilwa, Lazola Klatywa and myself.

The formation of the organisation was met with warm welcome and enthusiastic support at the Law Faculty by the Dean, Dr Kruger, as well as Mr Tladi Marumo and Ms Brahmi Padayachi. In our first year of operation, we have managed to pull a healthy membership of some 230 students of all races. The membership fee was comparatively low to other societies at a price of R180. The society was officially launched in March 2015 at Saint's Bistro where distinguished guests were invited, including Mr Nombumba, Judge Sandi, Mr Vavi, Advocate Matthew Fighterjet Mphahla, Mr M Ndabeni, and Mr Mqeke. In addition to that, we also had some staff members joining: Mr Tladi Marumo, Ms Padayachi, as well as Dr Kruger.

In the second term, we organised a dialogue which was entitled *Youth in a Contested Nation*. This consisted of a panel of three

people: one lecturer and two students. We had decided to take the approach of including students on this panel, particularly because discourse has shifted in such a manner that students and the youth are now actively demanding to have a say and be heard; we would like to create an environment which allows just that. Our panellists were Dr Richard Pithouse, Fezi Mthonti and Malaika Mahlatsi, who is the author of *Memoirs of a Born-Free*.

Our topic was centred around the current political climate, and intended to ask questions about the ideology of a rainbow nation, and on the very same token, interrogate identity in this political climate. Our aim was not only to interrogate what people are refusing to recognise, but also to introduce constructive ways of thinking in this political climate. We also wanted to encourage students to engage with the country and the continent at large, as well as how they should go about doing this.

We wanted to tackle the issue of a rainbow nation and why we are or are not a rainbow nation – including issues of race, ethnicity, xenophobia and afrophobia – and also what

issues we need to confront in order to make this aspiration of a rainbow nation a reality.

Towards the end of the second term, the society was invited to a National General Meeting in Johannesburg, where the keynote speaker for the day was Advocate Barry Roux SC. Five delegates from the university were sent to the NGM, which was both inspiring and informative.

The organisation also launched a community engagement programme, which was headed by Siseko Kumalo. The programme consisted of a tutoring, assessing and mentoring of local schools in Grahamstown.

Lastly, we are very proud of the fact that we have been nominated as New-comer of the Year, by the Black Lawyers Association Student Chapter, and are waiting in anticipation to find out if we will be awarded it.

The 2015 year was very successful for the BLA, and we anticipate an even better one in 2016. We encourage students to join this progressive organisation. Everybody is also free to join, as the society does not discriminate on racial grounds.

Ten minutes with Advocate Trengove

These questions were posed by the editors to Advocate Trengove following his public lecture relating to his involvement in the recent De Lange case. The case concerned whether the Methodist Church was entitled to dismiss a Methodist minister, after the church's disciplinary committee found her guilty of failing to obey their rules and policies when she entered into a same-sex union with her partner.

When deciding whether you will take on a case or not, do you take your own ethics into consideration?

All advocates are subject to the bar's "cab rank" rule. It means that an advocate may not decline a brief because the client or her cause is odious. The purpose of the rule is to ensure that even odious clients and causes have access to legal representation. There is however a limit beyond which I would not go. In the apartheid days, I would for instance not have appeared for the security police. But it was never a problem because they were equally determined that I should not act for them and thus never asked me!

In your public lecture, you stated that clients want "victory over justice". How do your personal beliefs of justice play into this?

It is simply a fact of life that most clients are not in the first place interested in justice but in victory. The duty of the advocate is of course to serve the client's best interests whether one agrees with them or not. However, if one acts for the victims of injustice, then the pursuits of victory and justice happily coincide. I try as far as possible to do cases of this kind.

What would you consider your most influential case in the public interest, and why so? Which case has had the biggest impact on you personally?

It is hard to choose, but the case I did for the Richtersveld people is undoubtedly one of the most memorable I have ever done. They were a long-forgotten people who had for more than a century been oppressed and stripped of their land and its minerals by successive colonisers. They sued for recovery of their land and minerals, initially lost in the Land Claims Court, but were ultimately vindicated in the Supreme Court of Appeal and the Constitutional Court. It was an extraordinarily humbling and gratifying experience to be part of their quest for justice.

In the current *De Lange* case, which you have just argued in the Constitutional Court, what do you think the possible ripple effects of the judgment will be if the church is successful or unsuccessful?

The *De Lange* case is hugely important for all religious groups because all of them discriminate on one or more grounds including religion, sex, gender, sexual orientation and so on. The case should help clarify up to what point religious groups may discriminate in the exercise of their right to

freedom of religion and beyond which there discrimination becomes unlawful.

What was it like to work with George Bizos?

It has been one of the great privileges of my life to work with George Bizos. I got to know him at the bar in the 1980s, worked with him at the Legal Resources Centre in the 1990s and have since then become close friends. He is to my mind the personification of the moral advocate whose quest has always been and remains to serve humanity.

What advice do you have for law students entering into the legal profession?

The most wonderful part of the legal profession is that it allows lawyers to make a difference; to have an impact on the lives of their clients, their communities and society at large. It is important to remember that that is what matters and makes it all worthwhile.



An Evaluation of the Efficacy of Statutory Debt-Relief Mechanisms in South Africa

Ryan McKerrow (final-year LLB student)

Sequestration in terms of the Insolvency Act

Courts have acknowledged that the primary object of the Insolvency Act¹ is to benefit creditors, rather than to provide relief to defaulting debtors.² Nevertheless, debtor relief is a direct consequence of the Act, as rehabilitation in terms thereof discharges all debts incurred prior to sequestration.³

However, this does not mean that debt relief by way of sequestration is easily accessible. The first hurdle to be passed takes the form of the extensive costs of High Court litigation, as required in such matters.⁴ A second obstruction is the prerequisite of an “advantage to creditors”, as laid down by the Act.⁵ Furthermore, in order to thwart the abuse of this mechanism through the use of “friendly sequestrations”, courts approach friendly applications with suspicion.⁶

From the above, it becomes apparent that the provisions of the Insolvency Act result in a *de facto* differentiation between “rich debtors”, who are able to prove an advantage to creditors, and “poor debtors”, who are not.⁷

The concept of debt is often shrouded in negative connotations. However, in many instances, this is merely a product of ignorance with regard to the important role played by the debtor-creditor relationship in fostering opportunities for economic growth. Borrowing allows debtors to take advantage of financial opportunities and leveraging effects which, without a capital injection, would be largely out of reach. Lenders, in turn, reap the benefits of interest charged on the borrowed capital to account for the time-value of money.

In light of the associated benefits, it is important that measures are put in place to encourage borrowing and lending. This is particularly important on the borrowing side of the relationship, where would-be debtors are often discouraged from taking on debt by the fear that their financial ventures may turn sour, leaving them with large sums of debt, and ever-mounting interest costs to repay.

This article will identify and briefly evaluate various legislative measures put in place as a means of providing debtors with security, while still advancing the financial interests of their creditors.

¹ Act 24 of 1936.

² *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC) 383.

³ S 129(b).

⁴ M Roestoff and S Reneke “Debt Relief for Consumers – Insolvency and Consumer Protection Legislation (Part 2)” (2006) 27 *Obiter* 98 at 99.

⁵ S 6, 10 and 12.

⁶ M Roestoff and H Coetzee “Consumer Debt Relief in South Africa; Lessons from America and England; and Suggestions for the Way Forward” (2012) 24 *SA Merc LJ* 53 at 56.

⁷ RG Evans “Friendly Sequestrations, the Abuse of the Process of Court, and Possible Solutions for

The result is the anomalous existence of a sub-class of debtors who are “too poor to go bankrupt”.⁸ This raises the question whether, under our new constitutional dispensation, the door has been opened for such debtors to challenge the constitutionality of their position.⁹

In response to this anomalous situation, Flemming J, in *Sellwell Shop Interiors v Van der Merwe*,¹⁰ stated that “insolvency legislation has fallen behind the needs of present times and merits reconsideration in so far as it requires advantage to creditors in all cases”.

Roestoff and Coetzee¹¹ agree with this stance, and believe that the correct approach to resolving the issue would involve the development of alternative measures aimed at restructuring the income of “poor debtors”. They cite with approval the case of *Ex parte Ford*, where the court refused to allow a voluntary sequestration on the basis that debt review was, in terms of s 86 of the National Credit Act,¹² considered to be a more appropriate mechanism to be used under the circumstances.¹³

Debt review in terms of the National Credit Act

In *Ex parte Ford*¹⁴ it was noted that, like the Insolvency Act, the provisions of the National

Credit Act do not intend to deprive creditors of their claims. Instead, they simply seek to regulate the manner and extent of their payment. Nevertheless, consumer protection through the resolution of over-indebtedness is identified as one of the key purposes of the Act.¹⁵

In terms of s 86(1) of the National Credit Act, over-indebted consumers may apply to a debt counsellor to conduct a debt review and, if appropriate, be declared over-indebted. This provides an opportunity for relief, as it may result in a Magistrate’s Court order¹⁶ rearranging the consumer’s obligations,¹⁷ or declaring a credit agreement to be reckless and suspending or extinguishing it.¹⁸

Nevertheless, the relief offered by way of the National Credit Act is not as advantageous to consumers as it may appear. Firstly, the Act only applies to credit agreements as defined in s 8 of the Act. Secondly, it is expressly stated that such mechanisms may not extinguish the consumer’s liability for any of his responsible financial obligations.¹⁹ Thirdly, the debt-relief value of the reckless credit provisions is somewhat dubious, as it has been argued that they do not offer a lasting solution to the consumer’s financial woes. The reasons advanced for this proposition are that suspending a credit agreement merely delays the consumer’s obligation to repay at least the capital amount owed, and extinguishing an agreement would not preclude the creditor from claiming restoration.²⁰

Overburdened Debtors” (2001) 13 SA Merc LJ 485 at 508.

⁸ MR Rochelle “Lowering the Penalties for Failure: Using the Insolvency Law as a Tool for Spurring Economic Growth; the American Experience, and Possible Uses for South Africa” 1999 TSAR 315 at 319.

⁹ Evans 2001 SA Merc LJ 508.

¹⁰ Unreported, WLD case no 27527/1990, 16 November 1990.

¹¹ Roestoff and Coetzee 2012 SA Merc LJ 59.

¹² Act 34 of 2005.

¹³ *Ex parte Ford* 384.

¹⁴ *Ex parte Ford* 383.

¹⁵ S 3(g).

¹⁶ In terms of s 87 of the Act.

¹⁷ In any manner contemplated in s 86(7)(c)(ii) of the Act.

¹⁸ As provided for in s 83(2) and (3) of the Act.

¹⁹ S 3(g) and (i).

²⁰ A Boraine and C Van Heerden “To Sequester or Not to Sequester in View of the National Credit Act 34 of 2005: A Tale of Two Judgments” (2010) 13 *Potchefstroom Electronic LJ* 84 at 97-98.

A further shortcoming of debt review is that no time limit has been set regarding payment plans. This means that, in theory, such plans could bind consumers indefinitely. Nevertheless, as a result of the *Ex parte Ford* approach, debtors seeking relief by way of voluntary surrender may be compelled to consider debt review, in spite of its likely inability to address their debt problems adequately.²¹

Administration orders in terms of the Magistrates' Courts Act

Section 74 of the Magistrates' Courts Act²² provides a further alternative to sequestration in the form of an administration order. Such orders involve a relatively simple and inexpensive procedure geared towards the rescheduling of overcommitted debtors' financial obligations. In *Fortuin v Various Creditors*,²³ it was noted that administration orders are intended to be used in circumstances involving small estates, where sequestration would simply "swallow the assets" of the debtor. As such, the Act provides that this procedure may only be used in cases where the total amount of all debt owed falls below an amount determined by the Minister.²⁴ This amount currently stands at R50 000.²⁵

Like debt review, there are several limitations to administration orders in so far as their ability to offer debt relief is concerned. The primary limitation is that the procedure is only available to those whose debts fall below the R50 000 threshold, and who have sufficient income or assets to qualify for the

procedure.²⁶ Furthermore, its application does not extend to *in futuro* debts due under existing and enforceable contracts.²⁷ Moreover, the procedure, unlike sequestration, does not offer any discharge of debt and, as no maximum time limit has been set, the debtor could, in theory, be burdened by an indefinite administration order. It is for these reasons that Roestoff and Coetzee²⁸ argue that administration does not provide a sufficient alternative to sequestration.

Moving forward

It is apparent that our law takes a creditor-orientated stance to debt enforcement. A debtor's only prospect for discharge lies in the process of sequestration. However, this process is expensive and discriminates against "poor debtors" through the imposition of the advantage-to-creditors requirement. The alternatives of debt review and administration have their own shortcomings, and it has been argued that, on the whole, they amount to "no more than a reorganisation of ... debt without providing any discharge".²⁹

In light of these findings, critics are of the view that, in order to provide adequate debtor relief, our law needs "a complete overhaul of its debt relief procedures".³⁰

²¹ Roestoff and Coetzee 2012 *SA Merc LJ* 63.

²² Act 32 of 1944.

²³ 2004 (2) SA 570 (C) 573.

²⁴ S 74(1)(b).

²⁵ GN R3441, *Government Gazette* 14498, 31 December 1992.

²⁶ A consideration which should be taken into account by the court in terms of s 74(1) of the Magistrates' Courts Act.

²⁷ *Cape Town Municipality v Dunne* 1964 (1) SA 741 (C) 745.

²⁸ Roestoff and Coetzee 2012 *SA Merc LJ* 66.

²⁹ Roestoff and Coetzee 2012 *SA Merc LJ* 69.

³⁰ Roestoff and Coetzee 2012 *SA Merc LJ* 75.



Religious Ministers – Working for God or working for the Church? A Reflection on *Universal Church of the Kingdom of God v Myeni and Others* [2015] ZALAC

31

Dr EH Van Coller (Senior Lecturer)

Recently, the Labour Court (court *a quo*) and the Labour Appeal Court had to deal with the matter of whether a pastor who is in the voluntary service of the church is an employee of the church or not. A pastor of The Universal Church of the Kingdom of God referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), after his service was terminated on the ground of alleged misconduct. The church argued that the pastor was not an employee of the church and that the CCMA had no jurisdiction to hear the matter. The arbitrator disagreed and found the dismissal to be unfair. The church was not happy with the outcome of the arbitration process and approached the Labour Court to review and set aside the arbitration award.

In the Labour Court, Steenkamp J held that the arbitrator was correct in his finding that the pastor was an employee of the church. The church was granted leave to appeal to the Labour Appeal Court.

The court *a quo* based most of its decision on section 200A of the Labour Relations Act (LRA), which creates a rebuttable presumption as to who is an employee for the purposes of the LRA. The court assessed the relationship between the church and the pastor against the factors listed in section 200A, and found that the church failed to rebut the presumption in section 200A of the LRA. The court referred extensively to developments in English law. Steenkamp J clearly interpreted the decisions by the United Kingdom Supreme Court to mean that the *manner* in which the minister is engaged and the rules governing the service, as well as the *intention* of the parties must be taken account against the specific factual background. He proceeded to consider the relationship between the pastor and the church, mainly with reference to the presumptions outlined in section 200A, despite his reference to numerous cases highlighting the importance of considering the specific merits and facts of each case to establish whether the parties did intend an employment relationship. In the specific circumstances, it was clear from the facts that neither the pastor nor the church had the necessary and deliberate intention to enter into any legally binding contract.

In the court *a quo*, the church relied heavily on the 2001 case of *Church of the Province of Southern Africa (Diocese of Cape Town) v CCMA & others*. The court distinguished the earlier judgment in the *Church of the Province* case and noted that the case was decided before the introduction of section 200A of the LRA in 2002.

In the *Church of the Province* case, an Anglican priest was suspended on grounds of misconduct after a disciplinary hearing. The CCMA declared the dismissal as unfair and the church took the case to the High Court, claiming that the CCMA had made a mistake because the relationship between the church and the priest was not an employment relationship, and that the CCMA therefore did not have the jurisdiction to decide the case. The court came to the conclusion that, in order to establish an employment relationship, there must be a contract of employment, and as there was no legally enforceable contract between the parties, there was no employer and employee relationship between them. What was important in this case was that the arbitrator determined the issue on the assumption that there was a contract between the parties, without determining whether that was the case, and the court thus found that there was no *intention* to create an employment contract.

The court *a quo* chose rather to rely on the case of *Schreuder v Nederduitse Gereformeerde Kerk Wilgespruit & others*, in which a minister of the Dutch Reformed Church was unfairly dismissed by the church, and the court was of the view that the *intention* of the contract of employment (*beroepsbrief*) was to create contractual duties in the form of an employment contract between the minister and his congregation. In the latter case, however, there was a clear *intention* to create a contract

of employment, which was neither the case in *Church of the Province* nor in *Universal Church of the Kingdom of God*.

The approach taken in *Church of the Province* is important for purposes of the argument in the LAC, where the church submitted that the only question relevant was whether the parties had the necessary *intention* to conclude any contract or to be bound by it and, if there was no such intention, that section 200A of the LRA did not apply. Ndlovu JA took the view that, on a proper interpretation of section 200A as well as the Code of Good Practice that came into force in 2006, both required the existence of an employment contract or some form of contractual arrangement, whether in writing or not, and regardless of the form thereof. The LAC therefore proceeded to ask whether there was any legally enforceable agreement in place between the pastor and the church. From their conduct and the language used in the agreement, it was clear that the necessary intention (*animus contrahendi*) did not exist, and the court correctly held that no contractual obligations existed between the pastor and the church. The appeal was upheld and the decision of the court *a quo* set aside.

It is also worth noting the 2005 case of *Wagenaar v United Reformed Church SA*, in which a minister of the United Reformed Church was dismissed by his congregation. Despite the ruling that there was indeed a contractual relationship between the minister and the church (based on the specific factual circumstances of the case and the necessary intention of the parties), the court highlighted the conflicting views in both the *Schreuder* and *Church of the Province* cases. Most importantly, the court stated that there is *no* general rule in South Africa regulating the employment

relationships of ministers of religion: “It seems that there is no general rule in South Africa as to whether a Minister of Religion is an employee or not. Nor is there likely to be. Different denominations have different teachings and ideologies. In my view each case depends upon the facts.” (par 139F).

The constitutional right to freedom of religion allows religious organisations and churches to give meaning to and to define the various positions in the church, including the position of a minister, according to their own religious views. Each case should therefore be judged on its own merits and facts. This view seems to be supported by the LAC in the case of *Universal Church of the Kingdom of God*.



The reality of virtual money: The risks associated with Bitcoin

Chelsey Smith (final-year LLB student)

provide its citizens with a greater level of economic stability.”³

While this statement paints a lovely picture, the truth is that a government’s ability to stabilise the economy is vastly dependent on a level of perfect execution from the central bank that is simply not attainable, especially in an emerging economy such as ours.⁴

The European Banking Authority has identified over 70 risks associated with virtual currencies, and these were discussed in great length at the World Bank Conference in Washington DC in 2014. This article aims to examine those risks which have implications for South Africa.⁵

The associated risks

The first, and perhaps most important risk facing those who wish to trade in Bitcoin, is that Bitcoin is not a form of legal tender. The currency is voluntary, meaning if vendors elect to no longer accept it, it becomes worthless.⁶

Another risk facing users is that the lack of regulation has allowed for unscrupulous

Bitcoin is described as “peer-to-peer technology” which operates without the authority of a central bank, meaning that the managing of transactions and issuing of bitcoins is carried out solely by the network.¹ This new approach to banking unsurprisingly appeals to those who subscribe to the liberal school of economics and condemn the bailing out of struggling banks, choosing to place the burden on the bank itself, rather than the economy as a whole.²

Critics of Bitcoin, on the other hand, seem to be those who favour government intervention in the economy. Mark Williams, former Federal Reserve Bank Examiner and avid commentator on this issue, states:

“Governments exercise a monopoly power on currency creation, with the understanding that doing so will

¹ Bitcoin “Introduction” <https://bitcoin.org/en/> (accessed 10 August 2015).

² E Mu “Why There Should be a Bitcoin Central Bank” <http://www.forbes.com/sites/ericlmu/2014/08/24/why-there-should-be-a-bitcoin-central-bank/> (accessed 10 August 2015).

³ K Torpey “Former Federal Reserve Regulator is Afraid Bitcoin Could Destroy Central Banking” <http://insidebitcoins.com/news/former-federal-reserve-regulator-is-afraid-bitcoin-could-destroy-central-banking/26306> (accessed 10 August 2015).

⁴ *Ibid.*

⁵ MT Williams “Virtual Currencies – Bitcoin Risk” <http://www.bu.edu/questrom/files/2014/10/Wlliams-World-Bank-10-21-2014.pdf> (accessed 10 August 2015).

⁶ *Ibid.*

operators to take advantage of Bitcoin sellers and buyers, which may lead to a risk of fraud or bankruptcy.⁷ A notable example of this was in 2014: the fall of Mt Gox, a Japanese Bitcoin exchange, where users were trading in what they believed to be Bitcoins, but were actually 'Goxcoins', essentially an item of currency with no real value. Mt Gox lost tens of thousands of their customer's coins, up to the value of \$400 million, and even today, it is unknown how this was possible.⁸

As a response to this, there was a call to demand that Bitcoin exchanges should operate like ordinary banks, i.e. requiring them to hold a certain number of funds in reserve.⁹ In doing so, Bitcoin would get treated as if it were part of the economic system. This poses a number of benefits, mainly that it would allow Bitcoin exchanges to extend credit. However, this is a practice which is strongly discouraged in the Bitcoin world. If Bitcoin exchanges were to perform the same functions as a bank, i.e. the safeguarding of customer's assets, they would have to keep all the coins they hold in their 'wallets'¹⁰ in order for the exchange to stay solvent, and thus the market demand for the coins could not be met.

Bitcoin users also face the risk of double spending. Bitcoin protocol dictates that all new transactions are validated through a block chain – a public ledger that is independently verified every ten minutes. This window may pose a potential risk if two businesses are paid with the same Bitcoin. If double spending has occurred during this

window, the merchant who is last to report the transaction has little recourse to retrieve their payment.¹¹

As Bitcoin is not regulated by any legislation, there is no protection in place for consumers against fraud, theft or ordinary human error. While the currency has the advantage of eliminating the financial middleman, it has the disadvantage of eliminating the legal protection that these institutions afford.¹² Bitcoin has no chargeback protection, like credit cards, and once transfers are made they are irrevocable. It is also for this reason that Bitcoin is the perfect playground for cyber criminals. If your e-wallet is hacked, the consumer is once again without recourse, and the currency is lost forever.¹³ As of 2014, it was estimated that about 1.3 billion bitcoins, totalling over \$500 million, have been lost and are thus permanently out of circulation.¹⁴

Conclusion

Bitcoin signals a new era in technology – one that poses many a risk to its consumers. It can be argued that importing a pseudo currency into an economy that has not been rigorously tested is a highly dangerous experiment. Critics therefore state that the only way to deal with these risks is to enforce greater regulation and international oversight, with the aim of putting consumer protection at the forefront. However, this regulation would undermine the exact practice that Bitcoin aims to achieve. It leaves to be seen how governments such as our own will choose to deal with these enterprising new currency, because, in spite of the critics, Bitcoin does not seem to be going anywhere.

⁷ *Ibid.*

⁸ E Mu "Why There Should be a Bitcoin Central Bank"

⁹ *Ibid.*

¹⁰ A Bitcoin wallet is the software program where the Bitcoins are stored. It has a private key for every Bitcoin address that is saved in the Bitcoin wallet of the person who owns the balance.

¹¹ MT Williams "Virtual Currencies – Bitcoin Risk"

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*



Shedding light on the State's Nuclear Build Programme

Tanaka Chibanda (final-year LLB student)

The beleaguered state-owned power utility, Eskom, has the monopoly to generate more than 95 percent of South Africa's electricity supply. Eskom's woes have been well-documented, and its failure to meet demand has resulted in a nationwide scheme for consistent load-shedding. After being plunged into darkness, the country has been left wondering what measures the state will take to ensure long-term, sustainable energy supply.

In March 2011, Cabinet approved and promulgated a 20-year Integrated Resource Plan (IRP) for electricity.¹ The plan proposes a mixed-energy agenda, which involves the efficient use of coal, wind, hydro, nuclear, solar and gas sources to supplement the nation's electricity supply. It was designed to be a "living plan", which would be revised by the Department of Energy (DoE) every two years. The current iteration of the plan, updated in 2013,² reveals that much has

changed since the plan's conception, and that changing assumptions and scenarios should be taken into account when making crucial investment decisions. Notwithstanding this, the Department continues to use the out-dated plan to justify its current investment decisions.

I will start by giving a rudimentary overview of the IRP, in as much as it provides for the procurement of nuclear power. There are only two issues which will be canvassed in this article. The first highlights the cost of the proposed nuclear build programme and what it could mean for the consumer. The second issue is whether they are adequate statutory safeguards regarding who will bear the risk in the event of a nuclear accident. I have gone to great pains to keep this brief.

The Relevant Updates to the IRP

The IRP, as it stood in 2011, proposed that by 2030 nuclear power should account for 23 percent of the country's energy source. This would be achieved through the nuclear procurement of between six to eight reactors, with a total capacity of 9600 MW. Eskom was to be the owner and operator. This proposal was made on the prediction that demand for electricity would have increased to 454 TWh by 2030. The demand in 2030 is now projected to be in the range of 345-416 TWh. To put it simply, the electricity demand outlook has changed markedly from that expected in the 2011 IRP, with the consequence that at least 6600 MW less capacity is required. Should the DoE move forward with the procurement of 9600 MW, it

¹ Integrated Resources Plan for Electricity 2010-2030 Final Report (2011) 25 March 2011.

² Integrated resource Plan for Electricity (IRP) 2010-2030 Update Report (2013) 21 November 2013.

would put the country at the risk of overbuilding generation capacity. Alternatives in renewable sources are presented as being sufficient to cure the immediate energy crisis, and provide long-term sustainable energy. The update contains a stern recommendation that the nuclear decision should be delayed.

On 8 July 2015, South Africa and Russia signed two memoranda of understanding on nuclear power co-operation. The agreements were inked on the side-lines of the seventh BRICS summit held in Russia. This places Russia's state-run nuclear corporation, Rosatom, as the frontrunner to win the bid to build South African nuclear-power plants, which will be worth billions of rands. Since 2011, France, China, South Korea, Russia and a joint United States-Japanese consortium have been vying to secure major construction contracts under the proposed nuclear programme. They have all dangled a few trinkets in South Africa's face, and the latest agreements with Russia confirm South Africa's acceptance of Russia's offer to train personnel for the nuclear industry, and to enhance public awareness of nuclear energy in the country. Grave concerns have been raised by energy experts³ and citizens alike regarding the financing of this multibillion-rand programme, and whether we will have sufficient skills not only to manage nuclear power, but to effectively provide for disaster management.

Can the South African taxpayer afford to pay for the nuclear build programme?

The estimated cost for the nuclear build programme is between R500 billion and R1.2 trillion. The DoE has yet to disclose where exactly the financing for this ambitious project

³ Energy Research Centre, University of Cape Town "Towards A New Power Plan" (2013) For the National Planning Commission http://www.erc.uct.ac.za/Research/publications/13ERC-Towards_new_power_plan.pdf (Accessed 05 August 2015).

will come from. From the details that are currently available to the public, it appears that the taxpayer will be footing the bill for many generations to come. Over several years, we would experience substantial tariff hikes, and the pre-paid electricity system will ensure that the poor are effectively priced out of electricity usage. Energy-intensive industries, especially in the manufacturing and mining sectors, will be greatly affected and may be forced to shed jobs. Further unemployment and poverty will be the order of the day. Needless to say, the nuclear investment decisions, which are shrouded in mystery, present avenues for corruption. We are poised to witness grand-scale corruption unfolding before our eyes. Energy Minister Tina Joemat-Pettersson told Parliament on 19 May 2015 that South Africa will start the nuclear-build programme this year, and would present the outcome of this procurement process to Cabinet by year-end. We are waiting with bated breath to hear how the department will make sense of the programme.

Who will bear the risk of a nuclear accident?

Another disclosure which is yet to be made concerns who will be responsible for the costs to repair damage caused by radiation if there is a nuclear accident. The nuclear sector in South Africa is mainly governed by the Nuclear Energy Act,⁴ the National Nuclear Regulator Act⁵ (NNRA) and the National Radioactive Waste Disposal Institute Act.⁶ Sections 29 (1) and 29 (2) of the NNRA state that the Minister of Energy is responsible for determining the appropriate levels of financial security to be provided by the holders of nuclear licenses in South Africa. According to

⁴ Act 46 of 1999.

⁵ Act 47 of 1999.

⁶ Act 53 of 2008.

the regulations,⁷ the levels of nuclear liability should be updated every five years, yet these have remained without being updated or revised in over ten years. If South Africa was to have a nuclear accident at the Koeberg nuclear power station, Eskom – as the owner and operator – would be liable, but only up to R2.4 billion. For any costs above R2.4 billion, the state would have to make up the difference through income from taxpayers. This seems completely inadequate, considering that, in 2014, Japan set aside R68 billion for reconstruction after the nuclear disaster at Fukushima. It should also be made clear whether the cost of a possible accident has been factored into the current price estimate of the nuclear build programme. South Africa must explicitly and with caution address the Fundamental Safety Principles, including assigning prime responsibility for safety to the operator of the nuclear reactor. South Africa should not be solely responsible for all damage caused both within and without the country's borders.

Conclusion

There are many advantages to nuclear power, but these can only be realised through careful planning, and a clear and transparent process conducted within a flexible framework, sensitive to changing assumptions and conditions.

⁷ National Nuclear Regulator Regulations, GN 581, Government Gazette 26327, 7 May 2004.



A personal perspective on using the “Tax Stories” as a pedagogical tool to bridge gaps in teaching tax

Richard Poole (Senior Lecturer, Department of Accounting)

I registered at Rhodes University at the start of the 1996 academic year with the desire to become a Chartered Accountant. I studied accounting at school and realised fairly early on that I would go to varsity and study to be a CA. The allure of the promise of the big pay cheque, big car, big house, status, and job opportunities was probably what persuaded me, if there was any doubt in my mind.

These are the things that occupy the mind of a wannabe CA just out of school: cars, houses, status and money. However, that is not always the be-all-and-end-all of the matter. After four years of studying accountancy, I realised that I could apply my mind to accounting statements and that I preferred finance to management accounting. Auditing was tolerable but dreary (even though I had a great appreciation for what auditing is meant to achieve). Tax seemed to find me as appealing as I found it. I give my third- and fourth-year taxation lecturers credit for this, as I would otherwise never have taken up taxation as a subject at a higher-degree level.

For reasons that do not bear discussion here, I never qualified as a CA, but became an academic, with taxation (somewhat fortuitously) being my chosen field of specialisation. Choosing academia over a fat wallet was, in retrospect, the correct decision as I thoroughly enjoy teaching. My first lecture was the proverbial “baptism of fire” as I was presented with a set of notes on employees’ tax in April 2000, and sent to lecture the third-year tax class with maybe a handful of public presentations under my belt at the time. Furthermore, it proved daunting to present myself with some authority before a class of students who were perhaps only a year or two younger than me.

With time, one becomes familiar with the lecture environment, and the very act of standing up to teach others serves in part to reinforce your own knowledge of the subject matter, and as such, creates a circle of positive reinforcement. Fifteen years later, I find myself as comfortable presenting to my peers as I do to second-year (entry-level) tax students.

Teaching students in an accounting environment is easier if your own education and training is in accounting and related fields. In 2000, I also started presenting the law and estate planning elective in the Law Faculty at Rhodes. Whereas accounting students all have undergraduate training in

commerce, most LLB students have undergraduate training in humanities.

Their respective approach to studying tax is therefore very different. However, even a superficial understanding of taxation is important, as the workplace is increasingly requiring of potential employees to have some form of knowledge of taxation. Accounting firms need lawyers in their compliance departments, as much as law firms require the services of accountants who can crunch the numbers and perform calculations.

This begs an inquiry as to how to teach classes of students who come from very different academic backgrounds, in such a way that all are stimulated with an interest in taxation. It is clearly evident that the way accounting students think is very different to the way law students think. In my experience, accounting students want to know *how*, without necessary questioning *why*. Law students often question *why*, before they ask *how*. These diametrically-opposite approaches to learning are understandable, as accounting and law students are being equipped at tertiary-education level for careers that are going to require different skill sets.

Taxation is a subject that is based in law and therefore has relevance to accounting and law students alike. As a lecturer in taxation, which is a prerequisite course for CA and tax specialist candidates and is also offered as an elective for aspirant lawyers, the challenge is to bridge that gap, so that the subject matter becomes equally alluring to both accountants and lawyers alike.

The “Tax Stories” project, undertaken by the South African Tax Educators Association, under the leadership of Professors George

Goldswain¹ and Lilla Stack,² has provided a very interesting platform for potential pedagogical advances in teaching tax. The “Tax Stories” have been published in the *Southern African Business Review*, Vol 19 (Special Edition). To expound on the theoretical grounding which informs the pedagogical contribution of the “Tax Stories” is beyond the scope of this article. Nonetheless, the purposes of the “Tax Stories” are to:³

- Explain the facts of each case and the decision in simple language to assist non-legal scholars to interpret these cases;
- Relieve the tedium of reading the often dry case reports and to assist ... in applying the principles established in these cases in practical situations;
- Demonstrate the continuing relevance of the principles established in the cases, or to critique the decisions; and
- “Bring the cases to life” by incorporating ... the historical and situational perspectives of the cases by providing a glimpse into the characters and companies involved.

As a co-author of one of the “Tax Stories”, I have found the exercise stimulating on many levels, especially in light of the above four intended outcomes of the publication.

Accounting students generally tend to disengage when required to read cases, and they seem to struggle to interpret or appreciate the relevance of many of the decisions that form part of our tax jurisprudence. I do not suggest that students are all guilty of apathy, but the perceived

¹ Prof GK Goldswain is a Professor of Taxation and Head of Department in the College of Applied Accounting at UNISA.

² Prof Lilla Stack is a Professor of Taxation in the Accounting Department at Rhodes University.

³ Stack, E.M.2015 “Tax Stories”, *Southern African Business Review*, Vol 19 Special Edition, iii – iv.

problem exists, given that South African tax law is informed not just by legislation, but also the tax cases that have come before the courts over the past 100 years.

By being able to inform the students of the contextual background to a case, both from commercial, political, historical and socio-economic (and now constitutional) standpoints – and with regard to the parties involved – has served to inspire a greater interest in the facts of the case and the important principles that are derived from them.

Law students can also benefit from the “Tax Stories” in that the economic reality of the facts before the courts are explained in simple terms, allowing law students to engage with the subject matter more deeply, without being put off by the commercial context in which the case was heard. I believe this to be

an necessity, especially for students who come from non-commercial undergraduate backgrounds.

It has been brought to my attention that a colleague at another university in South Africa has already prescribed the “Tax Stories” for his Master’s course, which I believe to be an important justification for the statement that these stories have a positive role to play in the education in Taxation.

In conclusion, my involvement in the “Tax Stories” project has afforded me an alternative teaching tool to access the minds of all the students I teach, and will hopefully inspire in all of them a desire to question everything, reflect on and engage in the subject content in a meaningful way, that will serve them well throughout their chosen careers.



Too much fuss over sperm and eggs: The genetic-link requirement and surrogacy contracts, and an analysis of the decision in *AB Surrogacy Advisory Group v Minister of Social Development*

Diana Machingaidze (final-year LLB student)

What does it mean to be a family? How far should the law encroach upon one's reproductive rights and choices? This article aims to address these questions through an analysis of the recent judgment handed down in *AB v Minister of Social Development*¹ where the Pretoria High Court struck down the genetic-link requirement, as required by s 294 of the Children's Act,² for the validity of any surrogacy agreement. Philosophical arguments affecting this topic will not be engaged with, as the focus is only on the application of the contested law.

Background to the case

The applicant was an infertile mother who intended to use a surrogate mother to have a child. She was unable to carry a pregnancy to term due to a permanent and irreversible medical condition.³ Before her divorce, she had two *in vitro* fertilisation (IVF) procedures, using her own eggs and her husband's sperm – both of which were unsuccessful. She was advised by her gynaecologist that due to the

quality of her eggs, the continued harvesting of her own eggs would not be feasible. After her divorce, she underwent a further eighteen IVF cycles in an attempt to achieve pregnancy. In fourteen out of the eighteen IVF cycles, the applicant used both male and female anonymous donor gametes (double donors).⁴ It is key to note that the use of double donors is prohibited in the context of surrogacy.

Surrogacy and the legislative framework

Chapter 19 of the Children's Act⁵ regulates surrogacy. The parents that the surrogate mother carries the child for are known as the commissioning parents. From the moment of birth, the child is considered to be the child of the commissioning parents or parent. In South Africa, to avoid situations where people end up entering into rent-a-womb agreements, a surrogacy agreement needs to be confirmed by the court in order for it to be valid in terms of s 295 of the Children's Act.⁶ This section states that "a court may not confirm a surrogate motherhood agreement, unless the commissioning parent or parents are not able to give birth to a child, and that the condition is permanent and irreversible". The court referred to this as the threshold requirement. A further contentious requirement is the genetic-link requirement set out in s 294 of

¹ [2015] ZAGPPHC 580.

² Act 38 of 2005.

³ *AB v Minister of Social Development* para 18.

⁴ *AB v Minister of Social Development* para 16-17.

⁵ Act 38 of 2005.

⁶ Act 38 of 2005.

the Act.⁷ In terms of this requirement, a genetic link to the child is needed. So basically, the sperm or eggs from either one or both parents is necessary to establish this requirement. This is where surrogacy differs from IVF – with IVF there is no genetic-link requirement which is why one can use double donors, whereas in a surrogacy agreement this is not permitted. Failure to comply with the genetic-link requirement renders the agreement invalid. This is problematic on so many levels: firstly, this excludes people, such as the applicant, who do not have a partner and could not use her eggs due to her medical condition. People who choose to be single, and for one reason or the other cannot use their gametes for this purpose, are also excluded. What the legislation effectively does is create a situation where those who cannot meet the genetic-link requirement are forced either to adopt, undergo IVF or not have a baby, as surrogacy is legally prohibited as an alternative for them. These people essentially become victims of their circumstances.

Analysis of the decision in AB v Minister of Social Development

The applicant's constitutional challenge to the validity of s 294 of the Children's Act⁸ was based on a violation of her rights to equality, dignity, reproductive healthcare, autonomy and privacy. The court looked at the overriding purpose of Chapter 19 of the Children's Act,⁹ and stated that the genetic-link requirement must be seen against this purpose, which was to make it possible for commissioning parents to become parents and acquire parental rights without the need to go through the adoption process. Ironically, the genetic-link requirement operates retrogressively in this regard, by limiting the

choices of those that cannot meet the genetic-link requirement to adoption or the use of IVF.

The court first looked at the constitutional concept of family and the question that arose was: whether genetic lineage should be relevant in defining the concept of family.¹⁰ In this respect, the court found that a family cannot be defined by genetic lineage. The court, in flowery language, said that the concept of family cannot be reduced to being defined merely by sperm and eggs – a finding most people would agree with.

The court referred to *Satchwell v President of the Republic of South Africa*,¹¹ where the Constitutional Court stated that:

“Family means different things to different people, and the failure to adopt the traditional form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration and protection under the law.”

If we think about it, most of the time there is no genetic link between an adopted child and adoptive parents. Where IVF is done through the use of donor gametes, there is no genetic link there either, and yet in both these scenarios, people are capable of having families. It does not make sense to exclude surrogacy agreements using donor gametes on the ground of a failure to meet a genetic-link requirement. To elevate the genetic-link requirement as a necessary requirement for a family would be placing form over substance. The traditional view of family has changed. In *Daniels v Campbell*¹² the court was of the view that “stereotypical and stunted notions of marriage and family now have to succumb to

⁷ Children's Act 38 of 2005.

⁸ Act 38 of 2005.

⁹ Act 38 of 2005.

¹⁰ *AB v Minister of Social Development* para 43.

¹¹ 2002 (6) SA 1 (CC) para 11.

¹² 2004 (5) SA 331 (CC) para 359D-E.

the newfound and restored values of our society, its institutions and diverse people". Advances made in fertility and reproductive technology also need to be taken into account in redefining the traditional view of family and this is something that the legislature needs to address.

Another aspect that was brought to the court's attention was that of autonomy, which the court agreed is a constitutional value. Reference was made to *NM v Smith*¹³ where the Constitutional Court stated that autonomy bears a close link to freedom of expression and other constitutional rights, such as human dignity, privacy and freedom. Although autonomy was not elevated to a right, the applicant argued that it had to be considered in deciding the matter, as was done in the past, value must be placed on the experience of autonomy as being the right to make decisions.¹⁴

Regarding the right to equality, the genetic link effectively discriminates based on infertility. The court was of the view that infertility was not a listed ground in s 9 of the Constitution; however it could potentially impair one's right to human dignity. Already there is emotional turmoil associated with infertility and the genetic-link requirement excludes those who cannot meet it from using surrogacy as an option. Adoption becomes one of the options – a difficult process which may take years. IVF is another option, but only for those that can afford it, as a standard IVF treatment can cost about R37 750 excluding medication and other extra procedures.¹⁵ Even though surrogacy and IVF are factually different procedures, this does not warrant a

legal differentiation given that the purpose of both is to assist infertile people who would like to become parents. The court crisply dealt with the issue raised by the respondents, that allowing double donor gametes to be used in surrogacy would be tantamount to creating a new child for adoption. In this regard, the court stated that once the child is born, it becomes the child of the commissioning parents, which therefore avoids complex procedures associated with adoption.¹⁶

The respondent argued that the genetic-link requirement is in the best interest of the child and that in its absence, a child born with a disability may be abandoned because it is easy for the commissioning parents to walk away.¹⁷ The problem with this argument is that, firstly, there was insufficient evidence to support this claim, and secondly, in my view, this could happen even if there was a genetic link – biological parents walk away from their children as well, and there is no evidence to show that the risk of this happening is reduced by virtue of a genetic link being present. Furthermore, it is difficult to see how a child's best interests in knowing its genetic origin, would be best served by targeting commissioning parents using double-donor gametes, and not those doing the same for IVF treatment.¹⁸ There is no rational connection between such differentiation and the legitimate governmental purpose it sought to achieve.

The genetic link also violates a person's right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, as contained in section 12(2)(a) of the Constitution. The use of donor gametes falls within the ambit of this right as it is a reproductive choice. Saying that it is not available for surrogacy, but it may be

¹³ 2007 (5) SA 250 (CC) para 145.

¹⁴ *S v Jordan* 2002 (6) SA 642 (CC) para 52.

¹⁵ Vitalab Centre for Assisted Conception "Standard IVF Treatment" <http://www.vitalab.com/clinic/costing> (accessed 14 September 2015).

¹⁶ *AB v Minister of Social Development* para 82.

¹⁷ *AB v Minister of Social Development* para 83.

¹⁸ *AB v Minister of Social Development* para 84.

used in more expensive IVF procedures, is an unjustifiable limitation on this right. If women have the freedom to choose to terminate a pregnancy without interference, anyone who

wishes to use surrogacy as a reproductive choice should also be free to choose whether or not to use donor gametes. The state's interference in this regard is unwarranted.

Conclusion

The right to reproductive choices cannot be reserved for the fertile – to do so is an unjustifiable limitation and, in my view, the High Court in this case was correct in striking down the offending provision. The Constitutional Court should not have a problem confirming the High Court's decision. After all, it takes a lot more than sperm and eggs to be a parent, and we should not place form over substance and deny those who really want to be parents the opportunity to do so, through the means available to them.



An analysis of business rescue proceedings in the Companies Act of 2008

Benjamin Rule (final-year LLB student)

Business rescue proceedings were introduced to South African law by Chapter 6 of the most recent Companies Act (the Act).¹ As a procedure, it seeks to give effect to one of the purposes of the Act, which is to “provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders”.² This shows a shift in emphasis from the rights of creditors, to a wider range of interests of affected parties.³ This article seeks to examine the procedure as set out in the Act, with a view to determining its usefulness and functionality in South African company law. The relevant provisions of the Act will be identified and discussed, as well as the problems they pose. It will be argued that, although the objects of business rescue proceedings are legitimate and useful to the South African economy, the procedure

itself has the potential to be protracted and ineffectual.

Objects of business rescue

The Act provides that a business rescue is designed to achieve one of two purposes: either to help the company continue to function as a solvent business or, in the event that this is not possible, to obtain a better result for the creditors and shareholders than that would have been possible under liquidation.⁴ These two objects of business rescue have been accepted by the courts.⁵ It seems that the proceedings were introduced in order to allow a better balancing of interests between the different affected parties (such as the creditors, shareholders and employees). As a result of this, affected parties have many rights in the procedure, as discussed below.

Important characteristics of business rescue proceedings

Before the specific procedures relevant to this essay are discussed, it is necessary to mention some important features of business rescue under the Act, in order to give better context to the procedures. Firstly, a company under business rescue will – subject to certain exceptions – benefit from a moratorium on the rights of any claimant against the

¹ Act 71 of 2008.

² S 7(k) of the Companies Act.

³ R Bradstreet “Business rescue proves to be creditor friendly: CJ Claasen J’s analysis of the new business rescue procedure in *Oakdene Square Properties*” (2013) 130 SALJ 44 at 44.

⁴ S 128(1)(b)(iii) of the Companies Act.

⁵ See for example *Koen v Wedgewood Village Golf & Country Estate Pty (Ltd)* 2012 (2) SA 378 (WCC) para 25.

company.⁶ Very importantly, the commencement of business rescue proceedings also results in a suspension of any liquidation proceedings which are currently in operation against the company.⁷ Another important aspect of business rescue proceedings is the appointment of a practitioner, who oversees the company while it is under supervision and has power over its affairs. Both of these characteristics shall be examined in detail below.

Business rescue by resolution

Section 129 of the Act provides a procedure by which the directors of a company can resolve, without the need for court interference, to voluntarily begin business rescue proceedings. This has clearly been included in the Act in an attempt to recognise the importance of avoiding legal proceedings – and the attendant costs where possible – as the amounts spent by the company on litigation are amounts which could otherwise have been recovered by creditors.⁸ There are a number of procedural requirements (the appointment of a practitioner and publication of various notices) which must be met before this resolution can have effect; non-compliance will result in the resolution being ineffectual⁹ and the company will be unable to pass a similar resolution (without going through a court) for three months after that.¹⁰ It is unclear in this situation whether the resolution would be in force until declared void by a court, or if a board of directors would need to apply to court for consent to

file another application within the three months.¹¹

Two problems with this procedure are immediately apparent. The first is that a board might make an honest error in failing to comply properly with the procedural requirements, resulting in the company being precluded from adopting a resolution without the added time and expense of a court application. The second problem is that this procedure seems to afford the board of directors an opportunity to pass such a resolution after liquidation proceedings against the company have commenced, thereby frustrating the liquidation proceedings in terms of s 131(6) of the Act. The court was faced with a situation potentially illustrating both of these problems in the case of *Engen Petroleum Ltd v Multi Waste (Pty) Ltd*,¹² where a creditor got a s 129 resolution set aside by a court for procedural improprieties.

The s 129 resolution seems to reflect the existing tension between a procedure which is quick, accessible and avoids unnecessary costs, and a procedure which is not open to abuse by those invoking it. As I intend to show, s 129 has the potential to be the ineffectual first step in a long process of litigation.

Objecting to a resolution

Section 130 of the Act gives an affected person the right to apply to court for an order setting aside either the s 129 resolution itself,¹³ or the appointment of a practitioner which followed it.¹⁴ This was the nature of the first application mentioned in the *Engen* case

⁶ S 128(1)(b)(ii) of the Companies Act.

⁷ S 131(6) of the Companies Act.

⁸ R Bradstreet “The new business rescue: will creditors sink or swim?” (2011) 128 SALJ 352 at 362.

⁹ S 129(5)(a) of the Companies Act.

¹⁰ S 129(5)(b) of the Companies Act.

¹¹ A Loubser “The business rescue proceedings in the Companies Act of 2008: concerns and questions (part 1)” 2010 TSAR 501 at 504.

¹² 2012 (5) SA 596 (GSJ).

¹³ S 130(1)(a) of the Companies Act.

¹⁴ S 130(1)(b) of the Companies Act.

above. This application also contains some requirements for notification and service on affected parties,¹⁵ which could complicate the proceedings if not met. While the opportunity for affected persons to object to the s 129 resolution is an important safeguard against abuse of such resolutions, it could potentially also lead to a prolonged court battle before the business rescue proceedings are able to commence. This would waste time which may be of the essence, giving the potential for it to be used as a tactical tool as much as for legitimate objection.

Business rescue by court application

Section 131 of the Act allows for a court to order commencement of business rescue proceedings upon application by any affected person(s). This provision is significant, as it allows persons – other than the board – the opportunity to intervene in the business if appropriate. This has led Loubser to comment that too many different categories of persons now have the ability to apply to court for business rescue proceedings.¹⁶ It is also important to note that any affected parties have the right to participate in the application proceedings,¹⁷ meaning that there are also stringent requirements imposed upon the applicant to notify affected parties, and serve the application upon the company and the Commission.¹⁸ The failure to serve notice of the application properly can be fatal to it. Indeed, this was the reason in the *Engen* case for the court's dismissal of the application. The right to participate was considered in the case of *Cape Point Vineyards (Pty) Ltd v Pinnacle Point Group Ltd (Advantage Project Managers (Pty) Ltd intervening)*,¹⁹ where it was held that the legislature did not envisage

affected parties having to apply to court for leave to intervene in the proceedings; although the court would have to regulate the procedure to be followed in their intervention for considerations of fairness.²⁰

It seems that this court application process, as with the resolution in s 129, has the potential to be used tactically and become subject to abuse, specifically (for example) by trade unions as a bargaining tool in wage negotiations.²¹ The application is also open to abuse by the companies themselves. In the case of *Swart v Beagles Run Investments 25 (Pty) Ltd (Four Creditors Intervening)*,²² creditors opposed the application saying that it in itself was an abuse of process and was the latest in a number of attempts to avoid and postpone the payment of the debts due.²³ This is clearest when business rescue proceedings are sought in order to suspend liquidation proceedings already in operation, or are already being sought, against the company. This article now turns to consider the relationship between liquidation and business rescue.

Business rescue and liquidation proceedings

Pending court proceedings have the potential to leave the affected parties in a state of limbo. This is best illustrated by the case of *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC*,²⁴ in which the court reluctantly allowed the liquidation proceedings (which had been subject to dubious delaying tactics) to be suspended as a result of a last-minute application for business rescue. The court was bound by the Act to postpone the liquidation proceedings so that they could be heard together with the

¹⁵ S 130(3) of the Companies Act.

¹⁶ Loubser TSAR 509.

¹⁷ S 131(3) of the Companies Act.

¹⁸ S 131(2) of the Companies Act.

¹⁹ 2011 (5) SA 600 (WCC).

²⁰ Para 21.

²¹ Bradstreet 2011 SALJ 358.

²² 2011 (5) 422 (GNP).

²³ Para 12.

²⁴ 2013 (6) SA 540 (WCC).

business rescue application. However, the court did provide for a presumption of a punitive costs award in that matter, in recognition of the abuse of process.²⁵

It seems that liquidation is preferred to business rescue by creditors in South Africa,²⁶ possibly as a result of the mistrust of the predecessor to business rescue – judicial management.²⁷ There is a history in the case law of already existing liquidation procedures or applications having to be suspended while a business rescue application is brought. One such case was *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd*,²⁸ in which liquidation proceedings were postponed for over a year before eventually being ordered. *ABSA Bank Ltd v Summer Lodge (Pty) Ltd*²⁹ clarified the position further by holding that the commencement of business rescue proceedings suspends any liquidation proceedings *ex lege*. It thus appears that the application for business rescue may be used as a tool by the directors of a company to postpone liquidation proceedings, rather than to return the company to solvency or to obtain a better deal for creditors.

It is admitted that the economy (and very likely the employees of the relevant company) has a legitimate interest in the company continuing business rather than becoming insolvent. The suspension of liquidation proceedings in s 131(6) of the Act clearly reflects this preference and is in line with the purposes of the Act. It is submitted, however, that the ability of directors and companies to prolong inevitable liquidation proceedings through a variety of court applications as a matter of tactics is inimical not only to the

interests of the creditors, but additionally to the employees and the economy.

The length of court applications can be exacerbated by the number of affected persons involved in the matter. It is not uncommon for one or more of the intervening parties (probably sensibly, from their point of view) to seek postponement in order that they might better consider the situation. This happened in the *Swart* case, the *Koen* case, the case of *AG Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd (Marley Pipe Systems (Pty) Ltd Intervening)*,³⁰ and finally in an application by the company itself (in order to better consider its options) in *Firststrand bank Ltd v Imperial Crown Trading 143 (Pty) Ltd*.³¹ Although the courts are generally reluctant to order the postponements sought (no postponements in the above cases were ordered), the cases clearly show that there are potentially parties (or affected parties) to these proceedings who have an interest in delaying either a liquidation order or a business rescue order. It is possible that such parties may resort to unscrupulous abuses of procedure if their prayers for postponement are denied (especially if the interests involved are large enough).

Non-cooperation of creditors

When a business rescue order is sought, the cooperation of the creditors and other affected parties is essential to the prospects of successfully achieving the objectives. If the creditors refuse to cooperate, the court order of business rescue proceedings is undermined. Considering this situation, two cases show that courts are reluctant to order business rescue if creditors make it clear that they are unlikely to cooperate. In *Nedbank Ltd*

²⁵ Para 34.

²⁶ Bradstreet 2011 SALJ 358.

²⁷ This procedure can be seen in Chapter XV of the Companies Act 61 of 1973.

²⁸ 2012 (2) SA 378 (WCC).

²⁹ 2013 (5) SA 444 (GNP).

³⁰ 2012 (5) SA 515 (GSJ).

³¹ 2012 (4) SA 266 (KZD).

*v Bestvest 153 (Pty) Ltd*³² the court pointed out that although the practitioner was entitled to approach a court under s 153(1)(a) of the Act, it was undesirable for a practitioner to become involved in protracted litigation. This is an especially important consideration, as any company in need of business rescue is unlikely to have the finances to support litigation whilst trying to rescue itself. In the case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*,³³ the Supreme Court of Appeal declined to alter the order of the court *a quo*, which rejected an application for business rescue proceedings because the two major creditors of the company had declared intent to oppose any business rescue plan.

These two decisions show that major creditors have the ability to render any application for business rescue a waste of time by simply telling the court that they will systematically object to any rescue plans proposed if the business rescue commences. It would seem therefore that a business rescue in terms of the Act is only available to those companies with agreeable creditors and affected parties. This somewhat undermines the scope and object of the business rescue proceedings, which was intended as a shift away from a creditor-friendly system to a more holistic approach.³⁴

Alternative scope for court proceedings

The Act also provides for court proceedings during the business rescue procedure in the following contexts: exceptions to the moratorium,³⁵ applications by the practitioner

to cancel obligations of the company;³⁶ applications by the practitioner to remove a director from office;³⁷ removal of a practitioner;³⁸ applications to set aside the remuneration agreement between company and practitioner;³⁹ and creditors' applications to review the determination of their status or voting interests.⁴⁰ There is thus a reasonable prospect of multiple court applications with various affected parties intervening, which would take valuable time away from the business rescue proceedings. The cost of much of this litigation would have to be borne by the company, and the escalating interest of the debt already owed in the interim would have the potential to put the business rescue objectives beyond the scope of achievement.

The same time considerations apply to the various procedures which need be adopted in order to effect a business rescue. Despite the Act placing a number of time limits upon the procedures, it is submitted that the varying interests of the affected parties would lead to delays in the normal procedure to be followed, similarly escalating the interest owed and adversely affecting the prospects of business rescue.

Conclusion

As a result of the various factors listed above, it is submitted that the business rescue proceedings in the Act, while clearly aimed at a legitimate purpose, leave too much space for delays (legitimately caused and through an abuse of procedure). This could potentially result in a situation where the interest accrued on existing debts and the litigations costs involved in ironing out the business rescue procedure and plan render the entire

³² *Nedbank Ltd v Bestvest 153 (Pty) Ltd; Essa v Bestvest 153 (Pty) Ltd* 2012 (5) SA 497 (WCC).

³³ 2013 (4) SA 539 (SCA).

³⁴ R Bradstreet "Lending a helping hand: the role of creditors in business rescues?" (2013) *De Rebus* 22 at 23.

³⁵ s 133(1)(b) of the Companies Act.

³⁶ s 136(2)(b) of the Companies Act.

³⁷ s 137(5) of the Companies Act.

³⁸ ss 130(1)(b) and 139(2) of the Companies Act.

³⁹ s 143(4) of the Companies Act.

⁴⁰ s 145(6) of the Companies Act.

undertaking of the procedure in the first place pointless. It is clear that such obstacles would not be faced in every case, however often-conflicting agendas of the various affected parties in the business rescue or winding up process would likely result in additional time and money being spent on the procedures in the Act rather than the rescuing of the

business. For this reason, it is concluded that, although business rescue is a valuable goal and potentially a much more holistic protection of interests, the current framework in the Companies Act provides too much scope for delays and abuse. Business rescue is therefore not currently a successful innovation, but has the potential to be.



***Magna Carta*: 800 years ago, and today**

Graham Glover (Associate Professor)

The 15th of June 2015 marked a significant legal milestone in the history of the world – the commemoration of the 800th anniversary of the signing of the *Magna Carta* at Runnymede, close to Windsor Castle, London. *Magna Carta* (the correct technical description is without a “the” before it, although this sounds antiquated today), or “the Great Charter” in English, was originally agreed between King John and a group of rebel barons as a peace treaty to end conflict between the two factions in 1215. It was a conflict born of dissatisfaction with the dictatorial and tyrannical behaviour of the absolute monarch, who at the time believed that he ruled by divine right, and that he was above the law. It may have been at its heart a political compromise between the elites; and one which was, in the short term, a failure, with war breaking out between the two sides again in 1216. Yet, over time, the *Magna Carta* was repeatedly re-enacted (notably in 1225 and 1297), and as the centuries went by it developed significant symbolic, political and legal significance as the fountainhead of the British constitutional and legal system that exists today; and indeed, as the source of some of the fundamental personal liberties

that we know today as “first-generation human rights”. The localised influence extended to what we know today as the Commonwealth as the British carried with them their legal, political and administrative system to those parts of the world that fell under the imperial yoke. One of England’s greatest 20th century jurists, Lord Denning, described the *Magna Carta* as “the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot” (Lord Alfred Denning “*Magna Carta*” in *The Times*, July 9, 1965).

Although the original *Magna Carta* contained many clauses, many of which no longer apply or which have long since been repealed, a few of its central provisions remain a feature of any modern constitutional democracy. The first is the idea often glibly described today by the slogan “no taxation without representation” – that by social compact the expectation that citizens should pay taxes to fund the state means in turn that the state, in whatever its form, must give the citizens a say of some kind in how that revenue is to be used. In the *Magna Carta* were hence found the first pioneering seeds of what we now know to be Parliament: the elected legislative branch of government. The second, associated aspect was the repudiation of the idea that the executive (at the time, the monarchy) was above the law.

The third, and undoubtedly most significant, facet was the contents of articles 39 and 40 –

which remain on the statute books in the United Kingdom to this day. These read:

“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice.”

In these provisions we find three central legal/political propositions without which all western-style democracies (as we commonly know them) would not exist. The first is the concept of the rule of law; the second, the idea of due process; and the third, the rule of habeas corpus (interpolated from article 45 of the Charter), the remedy for any attempt at detention without charge or trial. Lord Bingham famously said that these articles “retain the power to make one’s blood race” (The Rt Hon Lord Thomas Bingham of Cornhill KG *The Rule of Law* (2011) 4). Out of these cardinal propositions in turn flowed such conceptions as an independent and accountable police force, an independent legal profession, the concept of the formal trial (one by jury in many countries other than South Africa), and an independent judiciary. The contents of articles 39 and 40 formed the bedrock of the 1689 Bill of Rights after the restoration and the “Glorious Revolution” in the United Kingdom, the United States Declaration of Independence and its Constitution in the late 18th century, and also of the 1948 Universal Declaration of Human Rights. It hardly needs saying that their contents are also to be found in the Bill of Rights in South Africa’s 1996 Constitution, and most modern constitutional instruments. Not much may remain of the original Charter (indeed, only four provisions), but in name it

has become an emblem of the fundamentals of good governance and political responsibility. Unsurprisingly, it has been a rallying point around which critics of the British government’s intentions to repeal the 1989 Human Rights Act have united at the time of the 800th anniversary commemorations, and thereafter.

The commemoration of the 800th anniversary of the signing of the *Magna Carta*, although primarily a British/American event, was, sadly, not without its irony in the South African context. For that exact day (15 June) saw the flight out of the country of Sudanese President Omar al-Bashir, in the face of an international warrant for his arrest on charges of genocide, and an interim order of the High Court (Gauteng Division, Pretoria) that he not be permitted to leave the country pending the finalisation of a court application to compel the South African state to arrest him in terms of its commitments under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. Ultimately, as we all well know, the interim order was not enforced, raising questions about the executive’s true commitment to the rule of law as a result. In its judgment in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & others* [2015] ZAGPPHC 402, the court reminded us all of the fundamental commitment in s 1(c) of our Constitution to the rule of law. After citing the Constitutional Court’s view, expressed in *Justice Alliance of South Africa v The President of the Republic of South Africa* 2011 (5) SA 388 (CC) para 40 that the concept is “indispensable” to our society, the court proceeded to say (in para 38):

“Where the rule of law is undermined by Government it is often done gradually and surreptitiously. Where this occurs in Court proceedings, the Court must fearlessly address this

through its judgments, and not hesitate to keep the executive within the law, failing which it would not have complied with its constitutional

It is in these statements that one can trace the original purposes of the *Magna Carta*, and its rejection of royal (now executive) absolutism in favour of a balancing or

obligations to administer justice to all persons alike without fear, favour or prejudice.”

separation of powers. Let us hope that the al-Bashir matter will not sardonically mark a point at which our country turns away from a powerful (indeed cardinal) democratic imperative that had its antecedents exactly 800 years earlier, to the day.



Are the attack on foreign nationals in South Africa and the violent land grabs in Zimbabwe part of the same culture?

Leonard Mukosi (final-year LLB student)

Many people regard post-apartheid South Africa as a country with the most enlightened human-rights legislation in the world. However, repeated attacks on foreigners in 2008 and 2015 left many questioning the validity of such an assertion. This paper likens xenophobia in South Africa to the manner in which the land redistribution process was carried out in Zimbabwe. The two incidences unveiled alarming inadequacies in the legal systems of the two countries, and illustrates how the struggle for basic human rights is still critical for both countries.¹

Ethnic cleansing of property

Ethnicity denotes that certain groups share a common identity based on ancestry, language

or culture, and includes race and nationality.² The use of violence in both xenophobic attacks in South Africa and land grabs in Zimbabwe was exclusively targeted at people of specific ethnic groups. The actions of the Zimbabwean government in expropriating land for resettlement purposes, was aimed at persons who owned land because they were white.³ Similarly, xenophobia was unleashed on foreigners, often termed as “makwerekwere”.⁴

Prior to land reform in Zimbabwe, seventy percent of the most arable land was owned by a white minority, which encouraged a focus on the issue of land distribution.⁵ In South Africa, the perpetrators of xenophobia harboured a controversial belief that foreigners were taking away their jobs and economic opportunities.⁶

Although this may only be a vague connection, this analysis does not profess to go any further

¹E Wadongo “SA government must face court over xenophobic violence, migration policy” <http://www.thoughtleader.co.za/readerblog/2015/05/20/sa-govt-must-face-court-over-xenophobic-violence/> (accessed 08/08/2015).

² On the Recent Incidents of Ethnic-based Violence and Incitement to Hatred Across the Globe and Promoting Cultural Diversity and Inclusiveness United Nations, New York, 19 July 2013.

³ Zimbabwe: *Mike Campbell (Pvt) Limited and Others v Zimbabwe* (2008) AHRLR 199 (SADC 2008).

⁴ A Mudukuti “When the dust settles, who will provide justice for xenophobia victims” <http://www.thoughtleader.co.za/southernafrialitigationcentre/2015/04/22/when-the-dust-settles-who-will-provide-justice-for-the-xenophobia-victims> (accessed 08/08/2015).

⁵ “Zimbabwe: Supreme Court endorses land reform” <http://www.irinnews.org/report/28888/zimbabwe-supreme-court-endorses-land-reform> (accessed 08/08/2015).

⁶ *Ibid.*

than skin deep. From the above however, it can be noted that the sequence and pattern of the two depict that they are vitally linked by the fact that ethnic groups in both countries became the symbols of bigger problems, namely inequality in Zimbabwe, and poverty and unemployment in South Africa. Xenophobia in South Africa was arguably an imitation of Zimbabwean culture of ethnic cleansing with regard to property. Zimbabweans have perpetuated this culture, and it is now being perpetuated in South Africa.⁷

Chris Greenland, a former Zimbabwean High Court judge, investigated how the perpetrators of xenophobia and violent land grabs would justify their conduct. He said that Zimbabweans justified it as follows: “We had our good reasons for victimising the white farmers; their forbearers robbed us of our land.” Similarly, the perpetrators of xenophobic violence in South Africa would say: “We had our good reasons for victimising foreigners; they have robbed us of our livelihood.”⁸ As a result, white Zimbabwean farm owners were violently dispossessed of their land in Zimbabwe while foreigners in South Africa were attacked and deprived of their property as a way of “creating opportunities and eliminating economic competition”.⁹

Fundamental human rights at stake

Zimbabwe and South Africa each ratified the African Charter in 1986 and 1996 respectively. The African Commission stated in the case of

*Purohit and Another v The Gambia*¹⁰ that when states ratify or accede to international instruments, like the African Charter, they do so voluntarily and are very much aware of their responsibilities to implement the provisions of these instruments. As such, once South Africa and Zimbabwe ratified the African Charter, they became obligated to uphold the fundamental human rights contained therein, including the right property, dignity and the right to life.¹¹ Serious violations of all these rights were however witnessed during xenophobia in South Africa and land redistribution in Zimbabwe.

The Charter says the right to property may only be encroached upon in the interest of public need or in the general interest of the community, and in accordance with the provisions of appropriate laws.¹² Through violent land dispossession in Zimbabwe, and the unjustified destroying of businesses owned by foreigners in South Africa, the victims’ right to property was grossly violated. The Charter further protects the right to life by stating that human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.¹³ Domestically, both the Zimbabwean and South African constitutions observe the right to life, yet many white farmers were killed during the land grabs, and foreigners also lost their lives during xenophobic attacks.

In order to protect and promote human dignity, all forms of exploitation and degradation of people – particularly slavery, the slave trade,

⁷ C Greenland “When you speak to simple truth the rabid ones will come out and seek to attack, vilify and demonize you”

<https://www.facebook.com/photo.php?fbid=10205450210969096&set=pb.1665062110.-2207520000.1439070034.&type=3&theater>.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

¹¹ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003).

¹² Article 4 of the African Charter.

¹³ Article 4 of the African Charter.

torture, and cruel, inhuman or degrading punishment – must be prohibited.¹⁴ In *Modise v Botswana*, the African Commission stated that exposing victims to “personal suffering and indignity violates the right to human dignity”.¹⁵ Personal suffering and indignity can take many forms. Brutally attacking and forcibly dispossessing a human being of his property, for instance what happened in Zimbabwe and South Africa, undeniably amounts to total disregard and disrespect for the inherent dignity of the victims.¹⁶

Authorities backing violence?

Unlike the Zimbabwean situation, the South African government was not directly behind xenophobia. However, negative remarks made by political leaders – directed at foreigners – have fuelled speculation that South African authorities were insensitive to the plight of foreigners.¹⁷ King Goodwill Zwelithini, an influential South African king, said “we urge all foreigners to pack their bags and leave”. Prior to that, the son of South African President Jacob Zuma, stated that foreigners were “taking over” the country. ANC Secretary-General, Gwede Mantashe, also suggested that all undocumented migrants should be moved to refugee camps for processing before they are let into the country.¹⁸ One cannot help but wonder if such utterances were the fatal accelerant behind the violence that followed in April 2015.

¹⁴ *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ E Wadongo “SA government must face court for xenophobic violence, migration policy” <http://www.thoughtleader.co.za/readerblog/2015/05/20/sa-govt-must-face-court-over-xenophobic-violence/> (accessed 08/08/2015).

¹⁸ *Ibid.*

In South Africa, foreign nationals’ access to justice was also hampered as a result of reluctance from South African officials. For example, the National Prosecuting Authority arrested at least 300 people in connection with xenophobic violence, yet police investigations led to no prosecutions.¹⁹ Hence, there may be truth in the allegations that South African authorities lack the necessary commitment to the protection of the rights of foreigners.

The closest comparison to the Zimbabwean land-reform scenario would be the instigation of violent land acquisitions by war. Following this, the Supreme Court of Zimbabwe failed to respond to challenges concerning the constitutional validity of the land acquisitions, and subsequently gave a green light to government to proceed with acquisitions in 2008.²⁰

I pause to clarify that by equating xenophobic attacks to land reform, I am not justifying xenophobic attacks nor advocating for the restoration of the deep-seated disequilibrium in land ownership that existed in Zimbabwe prior to its independence. My main concern is that the manner in which these events occurred constituted gross violations of human rights, including the right to life, dignity and property.²¹ Furthermore, the lack of initiative from the responsible authorities to stop the violations is a significant setback for human rights, and needs to be remedied.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ C Greenland “When you speak to simple truth the rabid ones will come out and seek to attack, vilify and demonize you” <https://www.facebook.com/photo.php?fbid=10205450210969096&set=pb.1665062110.-2207520000.1439070034.&type=3&theater>.



The removal of individual access to the Southern African Development Community (SADC) Tribunal and implications for access to justice for SADC Citizens

Grace Moyo (final-year LLB student)

The Southern African Development Community (SADC) Tribunal was conceptualised by SADC leaders in 1992 upon the formation of the SADC Treaty, and interpreting and upholding the provisions of the treaty. However, the protocol which established the Tribunal was not assented to until 2000.¹ Upon establishment, the protocol authorised the tribunal to hear issues between member states, natural and legal persons, as well as human rights issues.² This resulted in the court taking on its first set of cases during the period of 2005-2007, all of them between individuals and a member state, and nearly all of them on human-rights issues against a member state. Notable is the case of *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*,³ which was a case brought to the court by a white Zimbabwean farmer who had had his land expropriated by the Zimbabwean government during the controversial land-reform programme. The SADC Tribunal in this instance found that the

arbitrary expropriation of land without compensation, on the basis of race, was discriminatory and unlawful, and made a finding against the government. Shortly after this finding, the Zimbabwean government challenged the legitimacy of the court and its competency to make findings, thus beginning a series of events that led to the court's ultimate demise.⁴ Following a lengthy suspension of the court, SADC heads of state decided in 2014 that the court shall be reinstated on the basis of an amended protocol, which only authorises it to hear inter-state disputes.

Limitation of access to justice and the rule of law

The rule of law is a central pillar of a democratic society that focuses on the substantive and procedural fairness in application of the law.⁵ It requires two things: firstly, that laws are enacted which are publically disclosed and applied consistently; and secondly, that they are fair and in line with principles of human rights, as declared in the Universal Declaration of Human Rights

¹ N Fritz "Up in Smoke: The SADC Tribunal and Rule of Law in the Region" 2012 *SAPFI Policy Brief No 11* at 1.

² *Ibid.*

³ [2008] SADCT 2.

⁴ N Fritz "Up in Smoke: The SADC Tribunal and Rule of Law in the Region" 2012 *SAPFI Policy Brief No 11* at 2-3.

⁵ United Nations Development Programme *Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices* (2013) 2.

(1948).⁶ Further to this, there must be means for all stakeholders to have these rights enforced, which includes access to the courts and access to a just decision by the courts.

In suspending the Tribunal, and then amending the protocol in a process that was convened behind closed doors in order to exclude natural and legal persons from approaching the court for a legal remedy, SADC heads of state have seriously undermined the rule of law and have taken away the right of access to courts from SADC citizens. A regional court, such as this one, served the purpose of providing recourse where a domestic court was unable or unwilling to make a finding in the matter for political or other reasons, or where a domestic court has acted in a manner that is not impartial. Such an instance of domestic courts not providing adequate remedies can be found in the *Campbell* matter above. By removing individual access to the court, the SADC heads of state have taken away the right to a just judicial remedy from such individuals, who may not have other means of obtaining one through a domestic system. For SADC citizens that are neither Tanzanian nor Malawian, they do not even have access to the African Court for Peoples' Rights, as their governments have not consented to its jurisdiction.⁷ This raises many questions around the real commitment of SADC countries to the furtherance of human rights, as well as the reasons for their resistance to a supranational court in the first place.

⁶ United Nations Development Programme *Rule of Law and Access to Justice in Eastern and Southern Africa: Showcasing Innovations and Good Practices* (2013) 2.

⁷ N Fritz "Up in Smoke: The SADC Tribunal and Rule of Law in the Region" 2012 *SAPFI Policy Brief No 11* at 4.

The wariness of African states of supranational courts

The suspension and subsequent amending of the powers of the SADC Tribunal are not the first or only example of African states publicly criticising and delegitimising supranational courts. African heads of state behaved in a similarly hostile manner to the International Criminal Court (ICC). Most notable has been their criticism of the indictment of sitting head of state Omar al-Bashir, and South Africa's failure to retain him in the country, pending a decision by a South African court on the government's Rome Statute⁸ obligation to turn him over to the ICC.⁹ Many African heads of state have expressed their disapproval of the ICC, and there have been rumours withdrawing from the Statute altogether.

Many human-rights activists and academics have criticised African heads of state for their failure to abide by international obligations, and to respect findings and indictments made by these courts. Heads of state have provided many reasons for this, including the ICC's supposed "targeting" of African states, and the infringement on national sovereignty by supranational courts such as the ICC and the SADC Tribunal. However, in my opinion, this resistance and hostility boils down to little more than ego and embarrassment at being called out for their various atrocities. African states – exemplified by the SADC Tribunal cases concerning Zimbabwe – have fallen victim to their own commitment to human rights and international legislation, and are waving sovereignty around in a desperate attempt to keep their indiscretions behind closed doors, and out of the public eye.

⁸ Rome Statute of the International Criminal Court, 1998.

⁹ A Tejan-Cole "Justice for al-Bashir" (2015) *Open Society Initiative for South Africa*.

African heads of state voluntarily assented to the Rome Statue and its protocols, and likewise to the SADC Treaty and its protocols. Their sudden decrying of its legitimacy and competency is as a result of becoming prey to the very process of which they approved, before they envisaged that it might one day work against them. Something about this line of thinking is tainted with a hint of patriarchal entitlement to rule without question and accountability, and a rule *by* law as opposed to a rule *of* law in their domestic jurisdictions. Lip service has been paid to human rights, which in countries like South Africa are held in high regard in domestic constitutions, and these heads of state have blatantly violated their own domestic laws. Although the protocol has not yet received the requisite two-thirds of signatories for official adoption, its very conceptualisation, and the fact that nine heads of state have signed it at all, is very concerning for people living in the SADC region.

Implications for democracy and human rights for SADC citizens

The removal of individual access to the SADC Tribunal has many implications for SADC citizens, and the region as a whole. To begin with, it really questions the practical usefulness of the court going forward. All of the cases that were brought before the Tribunal were brought by individuals seeking recourse against their governments, and none by states in dispute with each other. It is highly unlikely that member states in the SADC region will approach a regional court to settle disputes, as there is a much greater preference for amicable, diplomatic settlement of disputes. As such, it almost seems as if the Tribunal will serve little purpose in the years to come, should it be reconvened under the amended Protocol.

Aside from this, however, there is much more to be concerned about. The first is what appears to be a collective disregard for the rule of law in the region.¹⁰ This became very apparent with President Mugabe's lobbying for leaders to support his outcry against the SADC Tribunal in 2009, and has manifested itself over the years into the kind of behaviour we see now, whereby a sitting of African heads of state will allow an ICC indictee in its midst, without taking any action.

This disregard for the rule of law poses an imminent threat to functional democracies in the SADC region. Access to courts and respect for human rights cannot just be theoretical principles, but have to be practical realities for citizens of the region for there to be said that free and open democracies to exist. In an environment where citizens do not always have access to courts and have no recourse to any other body for atrocities committed against them, we risk a continued and unpunished persecution of SADC citizens.

The result of this removed access is that we will have governments that have no one to hold them accountable, and a citizenry that is frustrated by its lack of recourse to an impartial judicial system where the domestic one has failed. **We will risk a region where politics and the desire to maintain diplomatic friendliness will override human rights and the need to lobby for protection of citizens.** Such a region will be characterised by the wanton disregard for human rights, and no legitimate voice to speak up for the systematically silenced. This is a human-rights crisis for southern Africa, and one which civil society must continue to lobby vehemently against.

¹⁰ C Cowell "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction" (2013) 13 *HRLR* 164.



Adding insult to injury: Excessive costs of small credit to become exorbitant – legislated economic abuse of low-income consumers

Jonathan Campbell (Associate Professor and Acting Director of the Rhodes University Law Clinic)

On 25 June 2015, the Minister of Trade and Industry published draft regulations in terms of the National Credit Act 34 of 2005 (“the Act”) which, if adopted, will cause the costs of small credit (typically money loans), which are already excessive, to become exorbitant. If implemented, these new costs will have a devastating economic impact on low-income consumers, and increasing amounts of money will be drained out the hands of the poorest communities merely to service debts – this at a time when government claims that poverty alleviation is a national priority.

The current cost of small credit

The Act and the National Credit Regulations (‘the Regulations’), which were fully implemented in 2007, set new limits on interest rates, but also introduced new fees. The combined effect of interest, the initiation

fee and the service fee has caused the total cost of small credit (‘short-term credit transactions’) to remain exorbitant, illustrated in the table on the following page.

It is clear from the table that:

- (a) The smaller the credit, the more expensive it is.
- (b) The impact of the capping of interest rates on credit between R1 000 and R500 is minimal, and there has been a negative impact on loans of R500 and less.
- (c) The positive impact of capped-interest rates has, to a large extent, been negated by the high maximum initiation and service fees.
- (d) The impact of the initiation and service fees on smaller loans amounts to a skewing of the cost of credit away from interest and towards these fees, so that interest decreases relative to these fees.
- (e) This skewing has the dangerous effect of masking the true cost of credit from the consumer, and inhibits the Act’s objectives of promoting disclosure and combating over-indebtedness [section 3(g) and section 3(e)(ii) of the Act].

Illustration of the current maximum cost of credit on short-term credit transactions¹ in terms of the Regulations.²³

	Amount of initial loan	Duration of loan	Interest (5% pm) (R)	Initiation fee ⁴ (pm, when paid in instalments) ⁵ (R)	Service fee (always R50 pm) ⁶ (%)	Total cost of credit (interest + initiation fee + service fee) ⁷ (R and %)
1	R200	1 month	R10 pm	R32 pm	25% pm	R92 pm 46% pm
2	R500	1 month	R25 pm	R79 pm	10% pm	R154 pm 31% pm
3	R500	6 months	R25 pm	R15 pm	10% pm	R90 pm 18% pm
4	R1 000	1 month	R50 pm	R158 pm	5% pm	R258 pm 26% pm
5	R1 000	6 months	R50 pm	R30 pm	5% pm	R130 pm 13% pm
6	R5 000	6 months	R250 pm	R108 pm	1% pm	R408 pm 8% pm
7	R8 000	6 months	R400 pm	R167 pm	0,6% pm	R617 pm 8% pm

¹ A 'short-term credit transaction' is one that does not exceed R8 000 and is repayable within 6 months.

² It is assumed for the purposes of the calculations in this table that:

- The total initiation fee is charged to the borrower and capitalised i.e. paid off over the same period as the loan, at the same interest rate (5% per month in the case of a short-term loan). See Regulation 39(2) read with reg 42(1).
- Interest is charged only on the loan amount, for the purposes of simplicity. The Regulations allow interest to be charged on unpaid interest and other fees, which would make the total cost of credit even more expensive.

All figures in this table are rounded off to the nearest rand or percentage point.

⁴ The current initiation fee is R150 per month, subject to a maximum of 15%.

⁵ The monthly instalment is calculated by applying the formula $FV = PV(1+it)$ (FV = future value; PV = present value; i = interest rate; t = time).

⁶ The service fee is a flat rate R50 per month, expressed as a percentage of the initial loan.

⁷ The monthly combined cost of interest, the initiation fee and the service fee is expressed in Rands and as a percentage of the initial loan.

The cost of small credit should the proposed amendments be adopted

Interest

The draft regulations have done little to alleviate the situation, but if implemented, will in fact exacerbate the hardship and over-indebtedness of consumers of small credit. It is proposed that interest rates on second or subsequent small credit agreements in the same calendar year be limited to 3% per month, but interest on the first small credit agreement in every calendar year (the vast majority of credit agreements) will remain at 5%.

The initiation fee

It is proposed that the maximum initiation fee be increased from R150 to R165, which will further burden the consumer.

In addition, it has been proposed that the limitation of the initiation fee at 15% of the principal debt be scrapped. Whereas currently, the maximum initiation fee changes relative to the size of small credit of less than R1000, this will no longer be the case. No matter how small the loan (even a loan of R200) this amendment allows an initiation fee of R165 to be charged.

The initiation fee, whose purpose is not explained anywhere in the legislation, already adds considerably to the cost of credit. It is often impossible for consumers to find the necessary cash to pay the initiation fee up front, at a time when they are borrowing money precisely because they are in need of cash. Thus invariably the initiation fee is capitalised and added to the loan amount, thus attracting its own credit costs.

This amendment is inexplicable, and will cause untold additional hardship and over-indebtedness to a consumer community that is already in crisis. There appears to be no rational basis for it, especially given that over-indebtedness is widely accepted to be a

serious socio-economic concern in South Africa today.

The service fee

Further, it is proposed that the maximum monthly flat-rate service fee be increased from R50 to R60, which will add an additional financial burden to the consumer. Thus, 12% of an initial loan amount of R500 (currently 10%) will be charged each month merely to service the debt.

Like the proposed initiation fee, the maximum service fee is not varied according to the size of the credit. This result conflicts with the intention of the Act, which provides that the initiation and service fees “must not exceed the prescribed amount *relative to the principal debt*” [sections 101(1)(b)(i) and 101(1)(c)(iii)]. That is to say, it should be higher for bigger loans, and lower for smaller loans. This purpose is not borne out in Regulation 44, which may therefore be *ultra vires* and should be amended.

The result of the proposed amendments is that the cost of small credit, which is already excessive, will become unconscionably exorbitant. The proposed regulations achieve the exact opposite of the imperative placed on the Minister of Trade and Industry to consider, *inter alia*, the social impact on low income consumers [Section 105(2)(c)].

Conclusion

By allowing the costs of small credit to remain so high, the government has effectively made possible the exploitation of lower-income communities, which arguably amounts to legislated economic abuse. The proposed amendments will ensure that these trends continue and are exacerbated, and will contribute to the perpetuation of poverty.

Not only should these amendments not be adopted, but the current Regulations require urgent amendment in order to address these shortcomings and help to alleviate the burden

of debt of the poorest and most desperate South Africans:

- (a) The initiation fee should be removed if its purpose cannot be satisfactorily justified. Alternatively, the maximum initiation fee should be considerably reduced to R50 per credit agreement, plus 5% of the amount in excess of R1 000, but never to exceed R1 000, and never to exceed 5% of the total principal debt [Regulations 42(1) and 43(3)].
- (b) The monthly service fee on smaller short-term credit should be removed, and interest could be increased in

turn to compensate for this. Alternatively, the maximum service fee should be considerably reduced to approximately 1% per month of the credit amount, subject to a minimum fee of R10 per month, and never to exceed R50 per month [Regulation 44].

- (c) The maximum permissible rate of interest on short-term credit should be reduced to 4% per month [Regulation 42(2)].
- (d) The maximum size of short-term credit should be reduced to R5 000 [Regulation 39(2)(a)(i)].

When these suggested amendments are applied to the examples in the table above, they appear to address adequately the shortfalls in the Regulations and to achieve a fairer result, having regard to the need to balance the interests of both credit providers and consumers.



The Paradox of Colonialism: From the Conquest of Colonial Encroachment to the Dawn and Rise of Constitutional Democracy

Myra Mufuka (second-year Legal Theory student)

“Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another and suffer the indignity of being the skunk of the world.”¹

Although a simple myth, the legend of the phoenix bird may be one of the most fascinating tales of Greek mythology. The idea of a majestic, beautiful, long-tailed bird bursting into flames, leaving nothing but ashes, is exceptionally appealing, but to most is unfounded. Despite the biological and physical complexities that could make the sudden combustion of a bird plausible, there is another side to this tale that is applicable and analogical. The tale of the phoenix illustrates an important message: good things can result from the occurrence of bad things. From the flames of the phoenix rose a brand new, rejuvenated bird. The paradox of the legend of the phoenix symbolises rebirth, regeneration and, simply put, a fresh start. The same principle behind this legend can be extended to colonialism in South Africa and its successor: liberty, freedom and democracy. From the detrimental colonial conquest, South Africa rose as a nation in solidarity. Most important of all, from the struggles and sufferings of European encroachment came the greatest symbol of liberty, democracy, and a way forward: the Bill of Rights and the Constitution.

These momentous words, delivered by Nelson Mandela on the historic day when he was inaugurated as the first black president of South Africa, give us insight into the value he placed on two of the founding values of the Constitution – freedom and dignity. No one appreciates nor understands the magnitude and power of this promise and affirmation to the nation, than those who experienced the Apartheid regime to its full extent. I will be as bold as to state that quite possibly no one more than those who lived through the years of 1948 to 1994, fully appreciate the essence and transformation brought by constitutional democracy and the extension of fundamental rights to all. The Bill of Rights must be understood as part of the Constitution of the Republic of South Africa, 1996 (hereafter “the Constitution”) as a whole entity which serves to protect its citizens, standing as a transformative utensil of society and its political and legal system.²

¹“African National Congress: Statement of Nelson Mandela at his Inauguration” <http://www.anc.org.za/show.php?id=3132> (accessed 15 August 2015).

² I Currie & J De Waal *The Bill of Rights Handbook* 6 ed (2013) 1.

In respect of the painful history of the apartheid era, transformation and the Constitution is more than a just legal text and source of law. The Constitution is a symbol of hope, progression, peace, prosperity, and the determination of society to prevent a repeat of the evils that came with apartheid, namely oppression, exploitation, racism and the complete disregard for one's dignity.

"A body of fundamental principles and established canons of law under which a state is governed." This is the formal definition of a "constitution". A constitution holds the fundamental principles upon which a state is based, procedurally and substantively. Most African countries, including South Africa, have a codified constitution, which simply means that they have one single comprehensive document that is distinctly separated from legislation and the common law.³ As a means of curbing a repeat of state-sanctioned abuse, the new constitutional order stands to maintain relationships between members of society and the state, as well as the relationship between individuals.

The doctrine of constitutionalism is three-faceted: firstly, the limitation of governmental power by means of the separation of government into three branches; adherence to the rule of law; and the protection and promotion of the Bill of Rights.⁴ Prior to 1994, members of society were subject to the state and unable to question unjust policies or legislation. African citizens had duties and obligations towards the state. In modern times however, this has been reversed. In our democracy, the state is recognised as a powerful entity, having duties and obligation to citizens in the realisation of all their rights, as provided in the Bill of Rights. Both the

interim and final Constitution served to transform the condescending, bigot traits of the apartheid system. Justifiably, the intentions, purpose and effects of the interim constitution and its successor, are best described as revolutionary.⁵ The founding values of South African society are provided in s 7 of the Constitution – these being dignity, equality and freedom.⁶ Prior to 1994, these basic human privileges were not extended to all South African citizens. Racially-biased legislation dominated the law and ensured the rights and privileges to the white minority of citizens.

In conjunction with the safeguard of fundamental human rights by the Bill of Rights and constitutional supremacy, to prevent the abuse of state power against civilians, another aspect of great importance in the democratic order was the introduction of the principle of separation of powers.⁷ In essence, this entails the separation of the government into three interdependent branches: the executive, the judiciary and legislation.⁸ The doctrine of the separation of powers is a deliberate and strategic implementation of the Constitution, standing to ensure the limitation of governmental power in order to limit the exercise of power, so as to prevent its abuse against the citizens of the Republic.⁹

As any individual who is accustomed to South African constitutional law would know, the extension of the aforementioned and other rights to black citizens was greatly hindered by the doctrine of parliamentary sovereignty. This brings us to another fundamental but crucial change brought about by the new constitutional order, that served to contribute

³ Currie & De Waal *Bill of Rights Handbook* 7.

⁴ I Currie & J De Waal *The new Constitutional and Administrative Law* (2001) 160.

⁵ Currie & De Waal, *Bill of Rights Handbook* 2.

⁶ S 7.

⁷ Currie & De Waal *Constitutional and Administrative Law* 160.

⁸ *Ibid.*

⁹ *Ibid.*

to the realisation and promotion of freedom, equality and human dignity. This change was the replacement of parliamentary sovereignty with the doctrine of constitutional supremacy.¹⁰ According to this doctrine, the Constitution is the supreme law and stands above all other law, whether legislative, common or customary.¹¹ The eradication of parliamentary sovereignty meant Parliament was no longer a supreme law-making body.¹² Citizens now have the capacity to challenge any law passed by a legislature. With the power of judicial review, courts are able to measure legislation against the Constitution, and any law inconsistent with the values of the Constitution, or that infringe on one's rights, may be invalidated.¹³ As African people had no political rights, it was impossible to become a Member of Parliament, due to the fact that Africans had no voting rights. African citizens were unable to vote for a number of representatives in the law-making body. All members of Parliament were white, and this meant that law was made to benefit the white minority of the country. Racial, discriminatory mistreatment of black Africans could not be questioned because it was law – thus legitimate. With voting rights for all, this is no longer the case.

The state's limited power prevents the imposition of unfair, unjust legislation. Parliament is bound by the Constitution and is obliged to act within its constraints when it comes to carry out its functions.¹⁴ Legislation applies to all citizens, regardless of the colour of their skin, social status or position. This is in accordance with s 9 of the Constitution that states that, "everyone is equal before the law". Previously, under parliamentary

sovereignty, unconstitutional legislation could not be challenged by anyone, including courts, however due to the separation-of-powers doctrine, by means of judicial review, the judiciary is empowered by the Constitution to scrutinise and check the constitutionality, or lack thereof, of any legislation brought to its attention.¹⁵ This is part of the checks-and-balances principle that all branches have the duty of holding each other accountable for their actions, and the carrying out of their duties. This decentralisation of power and division of duties stands to protect the civil, social and political interests of the public.

We cannot deny the extensive development that South Africa has undergone since the dawn of democracy. The enforcement of constitutionally has to a large extent rectified the social evils of the apartheid. Many human-rights factors have been aided since 1994 and the traits of the new constitutional order are to be attributed. However, South African society still faces a great deal of challenges in the realisation of equality and dignity to all citizens. To date, South African remains the most unequal society in the world, primarily from an economic standpoint. Many citizens remain in poverty while other flourish economically. In this regard, equality has not fully been extended to all. The case of *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁶ illustrates how, even six years into democracy, thousands of citizens remained without access to adequate housing and shelter. Similarly, the case of *Mazibuko and Others v City of Johannesburg and Others*¹⁷ illustrates that a large group of citizens do not have access to water, despite seventeen years

¹⁰ *Ibid.*

¹¹ S 2.

¹² Currie & De Waal *Bill of Rights Handbook* 2.

¹³ S 2.

¹⁴ Currie & De Waal *Bill of Rights Handbook* 5.

¹⁵ Currie & De Waal *Constitutional and Administrative Law* 161.

¹⁶ 2001 (1) SA 46 (CC).

¹⁷ 2010 (4) SA 1 (CC).

passing since South Africa transcended into a society based on equality and the extension of socio-economic rights to all. Housing and water are basic requirements which all individuals are entitled to enjoy, and yet many still remain homeless or live in unsanitary conditions. This in itself illustrates the painful fact that economic equality will never be truly realised by all, especially in capitalist societies like South Africa, ultimately hinders the entitlement of equality and human dignity enshrined in the Constitution.

Conclusion

In summation, the Bill of Rights states that everyone is entitled to freedom,¹⁸ the right to practise any religion of their choice,¹⁹ to vote for any political party or to start a political party.²⁰ Discrimination of others based on their race, sex or sexual orientation is prohibited.²¹ These are a few examples of rights that did not exist prior to 1994.

South Africa has undoubtedly reached a commendable peak of social, political and domestic transformation in the last twenty-one years. Unfortunately, many citizens still live today without the full realisation of their socio-economic rights, and this ultimately hinders the realisation of one of the most important rights of the Bill of Rights: equality.

In *Mazibuko and Others v City of Johannesburg and Others*,²² Judge O' Regan noted that "there is much to be done to "[i]mprove the quality of life of all citizens – an important goal set by the preamble of our Constitution". It is important to note that transformation is a continuous process. Constitutional democracy has succeeded to a

large extent for the betterment of citizens, although socio-economic issues and rights may still be greatly hindered. Humanity, dignity, prosperity have never before been more evident since the fall of the apartheid regime. This must be attributed to the respect shown by society and the state for the provisions of the Constitution, and all for which it has stood.

¹⁸ S 12.

¹⁹ S 15.

²⁰ S 19.

²¹ S 9(3).

²² 2010 (4) SA 1 (CC).



Little abused souls: The reality of sexual exploitation of children

Sahar Davachi Omoumi (penultimate-year LLB student)

“[H]e took me over to a quiet part of the library with no windows ... he stood behind me and put his hands on my shoulders and whispered/kissed my ear ... it wasn’t until I was sitting in my 5th grade Sex Ed class that I knew the correct words to explain what had happened to me.”¹

This concealed problem, which had been covering our society with its dark and evil shadow, was finally perceived, and caught the attention of the public. It was time for people to stand up against sexual exploitation of children.

Society began to realise that sexual abuse of children takes away their childhood, and irrevocably interferes with their emotional and psychological development.² The

Constitution of the Republic of South Africa, 1996 explicitly states that “a child’s best interests are of paramount importance in every matter concerning the child”.³

Sexual abuse or exploitation can take place in different forms. “Until recently, child pornography was not seen as a significant contributory factor in the perpetration of child sexual abuse and, if it was recognised, it was seen as a lesser symptom of a much broader and more significant problem.”⁴ Therefore, in terms of access and distribution, there have been major changes in the nature of this form of child abuse.

This article deals with the effects on a child’s best interests, along with the response of South Africa’s judicial system to cases of the kind. Protecting children from being disturbed by sexual trauma is not just a criminal-justice issue. It goes beyond that assumption; it is a societal issue and not an easy problem to solve. Recommendations will thus be provided from local and other jurisdictions to address the problem.⁵

Definition of child pornography

The definition of child pornography is a controversial topic. Globally, much has been

¹ Anonymous “An interview with a survivor of sexual abuse by an educator: what parents can learn to protect their children!” <http://www.kidsafefoundation.org/an-interview-with-a-survivor-of-abuse-by-an-educator-what-parents-can-learn-to-protect-their-children/> (accessed 18 March 2014).

² M Nilsson “Perceptions of a Sample of Convicted Offenders of Child Pornography receiving Treatment at a Community-based Therapeutic

Programme in Cape Town, Western Cape, South Africa” (2009) 1.

³ S 28(2).

⁴ M Taylor & E Quayle *Child Pornography, an internet crime* (2003).

⁵ Nilsson 2009 1.

written on it, but our focus will be on South African legislation.⁶

In terms of the Films and Publications Act,⁷ child pornography is defined as:

“Any image, however created, or any description of a person, real or simulated, who is, or who is depicted, made to appear, look like, represented or described as being under the age of 18 years —

- (i) engaged in sexual conduct;
- (ii) participating in, or assisting another person to participate in, sexual conduct; or
- (iii) showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.”

There has not been a definition provided in terms of the Children’s Act.⁸ However, in the case of *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division*,⁹ the court looked at the dictionary meaning of the word “pornography”, which was as follows:

“[T]he explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic

feelings; literature etc. containing this.”¹⁰

This was used as a starting point by the court.

Why is child pornography a crime?

“Child pornography entails that a child is sexually abused; therefore, child pornography constitute child sexual abuse.”¹¹ Sexual exploitation has been defined as the act of using a child to satisfy the needs of others. This can take place in two different forms: firstly, where the perpetrator’s intention is to gain monetary reward or value and, secondly, when the perpetrator needs the child in order to satisfy his or her own sexual needs, and in this case, no monetary value will be involved.¹² In the case of *De Reuck v Director of Public Prosecutions*,¹³ child pornography is described as being harmful and degrading to children who have been used in its production.

Child pornography has a major effect on some of the important human rights contained in the Bill of Rights. A child’s rights¹⁴ are the most important rights which are violated by child pornography. Many other rights are also violated under the Constitution, which are as follows: the right to human dignity,¹⁵ the right to the freedom and security of the person,¹⁶ as well as the right to privacy.¹⁷

Internet and child exploitation

In order to explain the connection between child exploitation and the internet, it is important to have a good grasp of what the

⁶ SS Terblanche & N Mollema “Child pornography in South Africa” (2011) SACJ 290-291.

⁷ Act 65 of 1996.

⁸ Act 38 of 2005.

⁹ 2002 (12) BCLR 1285 (W).

¹⁰ Terblanche & Mollema 2011 SACJ 291.

¹¹ O M Asubiaro “www.crimeagainstchildren.com: Addressing Child Pornography via the Internet in Africa” (2004) 6.

¹² *Ibid* 6-7.

¹³ Para [61].

¹⁴ S 28.

¹⁵ S 10.

¹⁶ S 12.

¹⁷ S 14.

internet is and its background. The internet was invented by the United States Military after the Soviet Union released information about a nuclear weapon.¹⁸ It was used as a form of transporting data and messages. The internet, on its own, is not a provider of data, but it is only a form of transporting data which has already been placed on the network.

No one will know who posts information and how accurate the information is that is posted. However, it is undeniable that the internet has increased the availability of child pornography, which can result in serious problems for children, as well as society as a whole.

Children's rights protection on an international level and South Africa's position

There are several international human-rights instruments that place obligations on countries and highlight what is expected internationally of countries, when it comes to the protection of children, and in particular, the protection of children against child pornography. Article 34 of the United Nations Convention on the Rights of the Child is one such provision.

It must be kept in mind that South Africa is the only country in Africa which has signed the European Convention of Cybercrime, and is a signatory to that council. Signing this Convention was an important step for South Africa towards the prevention of cybercrimes, specifically child pornography.

South Africa engaged with this problem in the case of *De Reuck v Director of Public*

Prosecutions,¹⁹ where the court justified the measures in place, regardless of the limitations on rights in the Constitution, such as the right to freedom of expression.²⁰

Conclusion

Terblanche & Mollema²¹ concluded that **it cannot be determined whether South Africa's measures are going to be successful or not**. Furthermore, since the scope of the problem is unclear, questions must still be asked to decide whether criminal law should be employed to combat child pornography.

It can be said that, even though there are uncertainties about what constitutes child pornography and what falls within its scope, South Africa has made a decent start in recognising this problem, which was hidden for a very long time. The developments in our law will hopefully act as a springboard for routing out those who perpetrate such abuses.

¹⁸ B Sterling "Short History of the Internet" (1993) Angelfire
http://www.angelfire.com/oz/janica_214/Catherin e.htm (accessed 19 March 2014).

¹⁹ Para [65] – [67].

²⁰ S 16.

²¹ Terblanche & Mollema 2011 SACJ 307-308.

NOTES:

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